INDIAN WATER RIGHTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

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JUNE 22 AND 23, 1976

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OVERSIGHT HEARINGS ON INDIAN WATER RIGHTS

TUESDAY, JUNE 22, 1976

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senators Kennedy (presiding) and Abourezk.

Also present: Thomas M. Susman, chief counsel, and William A. Coates, minority counsel.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. We will come to order.

The Administrative Practice and Procedure Subcommittee today reopens hearings on Federal protection of the natural resources of American Indian tribes. Our first overview of this subject in 1971 involved hearings in 4 States, some 200 witnesses, and over 500 pages of testimony. Throughout those hearings I observed that on most fronts, our Government has failed woefully to fulfill its obligations and responsibilities to protect Indian rights and resources.

I also indicated that our record would serve as a benchmark for measuring future progress. Since those hearings I have been pleased to see substantial progress toward the securing of land and water and hunting and fishing rights for a number of tribes.

Congress has participated in that progress. We have restored tribal status to the Menominee Indians. We have transferred 185,000 acres of land adjacent to the rim of the Grand Canyon in trust for the Havasupais. And we have authorized and funded the purchase of privately owned land in the mineral strip to place unclouded title in trust for the San Carlos Apache tribe.

The Interior Department has taken a discernibly more enlightened attitude toward its trust responsibility involving Indian land and water rights. The Chemeuheuvi shoreline has been returned to that tribe by secretarial order. The Cocopah reservation has been doubled in size. The Mohave tribe has been recognized as owner of the long-disputed Hay and Wood reserve. Powers of the Coleville and Spokane tribes over regulation of hunting and fishing have been secured through a solicitor's opinion. The Navajo irrigation project has been dedicated. A Presidential order returned 21,000 acres to the Yakima tribe.

The Justice Department is also assuming its rightful place in carrying out Federal trusteeship obligations to Indian tribes, and it is being supported actively by the Interior Department and in this new role. A special Indian Trust Section has been established within Justice to represent Indians in natural resource cases. A number of significant cases have been filed: to adjudicate water rights for the Pyramid Lake Paiute tribe; to protect ground water for the Papagos; to settle Crow and Northern Cheyenne water rights, and to secure hunting and fishing rights to Northwest tribes.

Of course there remains much to be done. A number of water rights adjudications still must be filed, and the basic inventory work has not been completed in many areas. The Quechan tribe's title to 25,000 acres of land remains clouded by an old erroneous solicitor's opinion which has not been overturned. Many small California rancherias remain in limbo, despite violation of the termination statutes by the Federal Government. Destructive strip mining proceeds apace on the Navajo reservation. The Five Central Arizona tribes have been shortchanged by the Secretary of Interior in allocating Central Arizona project water—an action that appears nothing less than scandalous.

This morning, rather than going through the full litany of unfinished business facing the Justice and Interior Departments, we will focus on the result of a recent decision by the U.S. Supreme Court and on its implications for American Indians. Ironically, our first hearings in 1971 followed on the heels of the Court's *Eagle River* decision, which contained a foreboding that Indian water rights might be among the other federally reserved rights subjected to State court jurisdiction under the McCarran amendment.

The fears voiced by many of our witnesses 4½ years ago have unfortunately been realized wth the Court's recent opinion in the case of *Colorado River Water Conservation District* vs. *United States*, commonly called the *Akin* case.

These hearings were called to determine the potential consequences of *Akin* to Indian tribes and to see what the Executive and the Congress might do about them. Indian water rights—no matter how critical to a tribe's future, no matter how well inventoried, no matter how brilliantly defended by Government attorneys, cannot receive full protection in State court forums. For the security of Indian water rights rests not only upon a full commitment from the Executive and the complete support of the Congress, but also upon the availability of an independent and dispassionate Federal judiciary to adjudicate those rights. The *Akin* case may make this impossible.

Our witnesses today, representing Federal departments, Indian tribes, and State interests, will address themselves to the implications of the *Akin* decision for Indian water rights and the future economic development of Indian reservations.

As we discuss legal theories, court decisions, water rights doctrines, and acre-feet analyses however, we should keep in mind that not only the development of natural resources is at stake, but the future of many Indian tribes. This future for Indian people has most obviously been whether a tribe will be able to sustain agricultural self-sufficiency, to develop mineral resources, to maintain a fishery or a recreational area. It has corresponding implications for social welfare—employment opportunities and tribal income to support educational and other

projects. It also has a spiritual side. I remember the late Bob Jim testified before this subcommittee that Mount Adams was not just a piece of ground to which the tribe was laying claim, but historically to his tribe the mountain was the symbol of life's renewal, the giver of live to all living things. He said: "At the end of life it is to the mountain that the spirit of the Yakima returns."

I remember a Navajo medicine man, Descheeney Nez Tracy, who through an interpreter told us: "The water rights that we feel are ours through our traditional legends and our ceremonial ways, these waters are very sacred to us. The mountains are very sacred to us."

I remember Nellie Harner's moving words that Pyramid Lake "* * * is a religious symbol to us. You cut your finger or have a very bad cut, you go to the Pyramid Lake and bathe yourself, you first give a prayer to the lake spirit. * * * I think we have disturbance in the cities because there is no tie of those people to the earth, to the lake."

This year we are celebrating our Nation's bicentennial, but American Indians have not joined in that celebration. Our 2 centuries of national life have, for Indian people, consisted all too often, of battles with the white men, followed by promises which were broken and commitments which remained unfulfilled.

Only if we can firmly and permanently secure to Indian tribes their natural resources will we have reason to hope that they will join us in our Nation's next centennial celebration.

Our first witness is Peter Taft, the Assistant Attorney General for Lands and Natural Resources Division of the U.S. Department of Justice. We have representatives of the Yakima Nation, William K. Yalbys, who is the chairman; Roger Jim, Sr., chairman of the legislative committee, and James B. Hovis, the legal counsel. They are with us in the audience and we will not have time to let them testify but we will be sure that their views will be made a part of our official record and their views made known.

Mr. Taft, unfortunately as the witnesses understand, and through no fault of our own, the leader has called a session which starts at 9 o'clock. Usually nothing starts until 1 o'clock. We have the tax reform bill which I and a few others are very much involved with, but not a majority, unfortunately. I may have to go. We will make every effort to move this along. We want to make the record complete.

STATEMENT OF HON. PETER R. TAFT, ASSISTANT ATTORNEY GENERAL, LANDS AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Mr. TAFT. I am glad to have the opportunity to come here and speak to the subcommittee. In the statement we filed, we have gone into two oversight issues which were raised in 1971 and 1972. I would like to inform you that we have just finished some 43 days of hearings relating to the right to reopen the water adjudication affecting Pyramid Lake. We are hopeful we will be successful in that. It is being briefed at this time.

Senator KENNEDY. We want to take note of that. This has been something we have been following very closely for 4 or 5 years. I think it is very reassuring to have this kind of action by the Department.

Because of your own personal interest, I know you are going to do

your best. I want to say how much I appreciate it and I know I speak for other Senators on the subcommittee.

Mr. TAFT. If we can reopen that decree I am sure we will be successful. The Supreme Court recently came down with the *Pupfish* case which stood for the fact that in that instance we were entitled to have the water necessary to maintain the monument for the Pupfish. It is the same kind of thing that would be involved in Pyramid Lake.

I would also like to point out that we have as you noted, created an Indian resources section. Myles Flint is the acting chief. I would like to say that I think the experience of 1 year has been very valuable. We have there a group of attorneys whose sole concern is to represent the tribes and their interests. Even if there may be from time to time conflicts within the United States as a whole, nonetheless with this group there is no conflict.

Their primary concern is to represent the tribe and the tribe's concerns. In a practical sense that has had a very important effect. We have over 200 cases we have filed on behalf of the tribes. I would say that the conflicts that may exist either within the United States or sometimes within or between the Secretary of Interior and the tribes really represent a very small percentage of those that we have, perhaps less than 5 percent.

Most of them I feel are going very well. Directing my attention to the *Akin* case itself, and the *McCarran* amendment, as you know, we filed suit in Colorado, I believe it was in November 1972, to adjudicate the water rights of the two tribes. We filed in the Federal court. Ultimately, a motion to dismiss was filed which was granted and which ultimately was upheld by the Supreme Court.

The theory of the Supreme Court was that the State of Colorado had a special procedure set up for water rights. They had divided the State into the various basins that are involved and they have a court for each one. They have what is effectively a continuing adjudication going at all times which is finding new rights, and which is readjusting past rights according to priorities and which is litigating such things as abandonments. The Supreme Court felt that this State proceeding should be granted in effect the equivalency of a priority over the Federal courts in adjudicating State water rights, that they had a special proceeding, and they had a special adjudicatory and administrative setup which the Supreme Court felt would interfere with a Federal court adjudicating the same rights.

It used the *McCarran* amendment, which effectively waives the right of the United States to be sued only in the Federal courts and permits it to be sued in the State courts. The effect of this, I think, is very unfortunate and how broadly it will be extended to other States is hard to say.

Colorado is a bit unusual in the type of procedure that it has but I think it is fair to say that every State has some special administrative operation that deals with water rights.

Unfortunately, there is the further fact that almost any State you may go into, or any Federal court, when you present a Federal judge with a case that can have as many as 10,000 defendants, as we have in Pyramid Lake, if he has a way out, it is very likely he will use it.

If there is a State proceeding, even if it may have been filed after the Federal court—and there is often then a rush to the courthouse

between the State and the Federal courts—there is likelihood that the effect of *Akin* will be the Federal courts will defer to State courts fairly much across the board.

As a result, I think we must conclude that Indian water rights from this point on are in the majority of instances going to be adjudicated in State courts as long as the McCarran amendment is in effect and applicable to the adjudication of Indian rights.

I say this is unfortunate and I believe it is borne out in both a history of what the courts have found over 100 years and by the facts as we know them today. I think there has been a historic conflict between the tribes and the States with the United States, the balance of power on the side of tribes in its trust responsibility.

Supreme Court cases, as much as 100 years ago, have noted the fact that there has been a historic hostility between the States and the tribes and that, indeed, it is the Federal interest that has protected the tribes wherever they may be.

Inevitably, this runs over into the courts. Similarly, I think we have a situation which is developing day by day now in the State of Washington where, in effect, the State courts and the State administration both have totally abandoned the protection of Indian treaty rights in fishing and have thrown the total burden of enforcement of fishing rights not only for Indians but also in effect for commercial and sports fishermen, into the Federal court. They have thrown up their hands. They have abandoned any semblance of recognition of obligations to the tribes in that instance. I think it is fair to say that very much the same thing will come up wherever water rights or Indian rights as a whole come head to head with strong commercial interests within a State.

Water, as you know, is the central interest in the arid West. The reserve right—both the Indian right and the Federal right—is unusual for the States to deal with. The Indians are just beginning to use their rights. Often they come in with a first priority because their reservations were set up long before many of the other projects and other uses became effective in the States. What that means is you may have a total State commercial operation going and the Indians will come in and bump them off because they will come in first, and as they use their rights up, they will start to bump the State and local interests one by one. The effect of this, I think, would be to create great political concern and, unfortunately, hostility to Indian rights.

I would like to point out also, a difficulty we have in keeping uniformity of interpretation of Indian rights. There are probably 15 or more States in the West. If Indian rights are to be adjudicated in the State courts, in effect you have the potential of 15 different interpretations.

Then you have only a single way to get uniformity among them and that is on certiorari in the Supreme Court. The Supreme Court may deal with three or four Indian cases a year. To think that uniformity may be maintained in this way over 10 or 15 States is very unlikely, especially when the States and State courts may be using circuitous ways to cut down Indian rights.

On the other hand, if you put it in Federal court, and adjudicate it in Federal court, effectively you go up two courts of appeal and they have recourse to the Supreme Court. If the Supreme Court is over-

seeing two courts of appeal, it is easy to get a uniform interpretation of Indian rights. I would further point out that as any attorney knows, the finding of facts can be perhaps the most important point in any case.

If you get a judge who is going to find facts, those facts are concrete. Appeals courts will not interfere with them. In the event there is anything to support them at all, the result is you come into a situation again where hostility may affect findings of fact. Instead of having a full loaf to which the Indians may be entitled, as a result of the fact-finding procedure they may end up after time with half a loaf. That half a loaf will not get reviewed at any point by the State or even the Supreme Court. I feel that is a terribly important point and one reason why the *McCarran* amendment is very unfortunate as applied to Indian rights.

Senator KENNEDY. Should we give exclusive jurisdiction to the Federal courts in this area?

Mr. TAFT. For the Indian water rights, that is correct. I would point out one problem there. As a practical point, it is that you do not want adjudications going with as many as 10,000 defendants which is what we have in Pyramid Lake: One series going in a State court and one series going in a Federal court. The point we would make is there are means whereby the Indian right alone can be adjudicated in the Federal court effectively by making the State a class action defendant, or by having free right of intervention from those that wish to appear.

So the Indian right can be adjudicated simply and directly with a good State defense to it and the Federal court establishing the amount and the priority. With those findings, then, the State water engineer, or the State proceedings can simply plug that in. That is exactly what these continuing hearings on adjudications in Colorado do, for instance. They make particular findings with respect to a particular user and they then plug that into the system of priorities.

Senator KENNEDY. Is that working in Colorado?

Mr. TAFT. That works. It does work. I think it would be important that whatever procedure we devise to make sure——

Senator KENNEDY. You mean not only water rights, but also include all the Indian rights?

Mr. TAFT. For the most part we don't have a problem with respect to other kinds of rights because we don't have the waiver that the *McCarran* amendment provides. We do protect the other rights in the Federal courts. Really it is a peculiar——

Senator KENNEDY. What about reclamation and park service?

Mr. TAFT. That deals more with the question of whether you have a conflict within the United States, itself. It comes up in a small percentage of the cases that we have, really.

It is a conflict of interest, in a sense, in two places. It is often said that the Department of Justice is the one that has the conflict when it goes to court because it has to represent reclamation and the tribe at the same time and whatever conflicts there may be.

However, it also is one that exists within Interior, structurally. They ask us to sue. They ask us the kinds of positions we take. We tend to follow directly what they request. Often the conflict is adjudicated, if you will, within Interior before it comes to us. We then go into

Federal court, often with effectively what may be a compromise or what may be a pure assertion of Indian rights.

In a practical sense—in recent years that has been protected by the fact that Indians now have their own counsel. They are very active in the courts. I would say almost every important case that we have had, the tribes have moved to intervene. Often they have perhaps filed the case first and asked us to join them. We have worked things out I think as well as we can. The pure Indian interest is represented by the tribe and its counsel. I look on that as an important safeguard to assure that we are doing a proper job and to assure that we have the true tribal voice. Often what we think is best for the tribe is not what they think is best.

Senator KENNEDY. Would the Department of Justice support the exclusive jurisdiction in the Federal courts?

Mr. TAFT. In the normal course we defer to Interior to take what they determine to be the position in the best interests of the tribes. Assuming the Department of Interior were to back that, I think it is fair to say that we would strongly join them.

Senator KENNEDY. From the judicial point of view, I would think from what you have said here, that your review of the law and the study of the history and the protection of these rights, you feel your task would be more helped by the Federal court jurisdiction.

Mr. TAFT. I think that is correct. That is the position we took in fact in the *Akin* case. As a matter of policy, we would support.

Senator KENNEDY. Now do you think Congress intended in the history in the *McCarran* amendment to subject any water rights to State court jurisdiction?

Mr. TAFT. I think it is quite hard to say. I think the court was affected by this concept of having two adjudications going with thousands of defendants in two courts at the same time. In a certain sense in the *Akin* case, the Supreme Court abandoned the position it has always taken that any ambiguities are interpreted in favor of the tribe. I think it is very fair to say that the *McCarran* amendment is ambiguous in this area. Instead of interpreting the ambiguity in favor of the tribe, it deferred to the State courts. Fortunately within the last week or so the Supreme Court came down with a tax case in which it strongly reaffirmed the doctrine that interpretations are made in favor of Indian tribes where there is any vagueness. To a certain extent, the court made an exception to their normal rule of interpretation, perhaps because of the unusual nature of adjudications in this area.

Senator KENNEDY. I know it has been suggested that the reason the Supreme Court applied the *McCarran* amendment to Indian rights was because the Justice Department failed to distinguished Indian water rights from other Federal reserve rights. Is this a fair characterization of the Government stand?

Mr. TAFT. I don't think that is correct. We have made the same claim for Federal rights as we have for tribal rights. The arguments we made are much stronger in favor of the tribes than they are in favor of the other U.S. water rights. We have made the same argument for our own rights.

Senator KENNEDY. I want to thank you for your appearance here. I have asked about this specific issue as you probably know, from every prospective Attorney General that has been here and I am going

to continue to ask it as long as I am a member of this committee. We personally feel that there has been a very fundamental failure of a very basic responsibility and that has been in the protection of Indian rights. The Justice Department has to play an extremely important role. It has been something that far too few Attorneys General have been even aware of. When they have been made aware of it—with some exceptions—they have cooperated. I think quite clearly the efforts you are making now could not be done unless you had an Attorney General that was concerned about it. I think that has to be included. But this is an area of tremendous importance for the country and for the people that are affected.

Do you have a special budget for your department?

Mr. TAFT. There really is no special budget for the section; they get an assignment of attorneys which can be changed by our own determination.

Senator KENNEDY. How many do you have?

Mr. TAFT. We have eight with authorization for nine. We just lost one to New Mexico. However, they have the full use of the U.S. attorneys offices throughout the country. They have a caseload of about 200 cases. I feel at this time that they can fully handle them.

Senator KENNEDY. They can probably handle a few more, too.

Mr. TAFT. I am sure more will come along.

Senator KENNEDY. Do you have any Indian lawyers there?

Mr. TAFT. We have one. The section was created and the attorneys were taken from within our own group. It is not as if we hired nine new ones. Our hiring authority right now is fairly stringent.

Senator KENNEDY. We are going to continue to inquire whether we can be of any help or not in that area. We want to continue to press this. I think the record that has been made by your Department has been very important. We want to make sure that you are getting the kind of support that you deserve.

Thank you very much. We appreciate the opportunity to work with you. We thank you for your interest. I think it is a good record.

[The prepared statement of Peter R. Taft follows:]

PREPARED STATEMENT OF PETER R. TAFT

As Assistant Attorney General, I am honored to be given the opportunity to appear before this subcommittee on a matter of such importance to the Indian community.

Before proceeding with my testimony on the effect of the recent Supreme Court decision, *Colorado River Conservation District, et al.* v. *United States*, [No. 74–940, 74–949,] I would like to take this opportunity to briefly update the subcommittee on the development of certain matters which were the subject of hearings conducted by this subcommittee in 1971 and 1972. During those hearings, this subcommittee sought information as to what action the Lands Division had taken to resolve the *Pyramid Lake* controversy, and the manner in which Indian litigation is handled by the division.

In October of 1972, the United States sought leave of the United States Supreme Court to file suit against the States of Nevada and California to resolve the *Pyramid Lake*, controversy. In June of 1973, the Court declined to exercise its original jurisdiction, and indicated that the litigation should proceed in the respective Federal district courts for Nevada and California. In December of 1973, such a suit was filed in Nevada, *United States* v. *Truckee-Carson Irrigation District, et al.* [civil no. R–2987 JBA,] in United States District Court for Nevada. Named were the State, major water users, and over 15,000 other parties either individually or as part of a class. Since then, parties have been served, certain preliminary matters heard, and a lengthy and complex trial just conducted on

the issue of whether the prior water adjudication on the Truckee River serves as a legal bar to the present action. This proceeding alone consumed 43 trial days, involved 24 witnesses and saw the introduction of approximately 1,500 exhibits. At the conclusion of the trial, evidence had been received by the court on every aspect of controversy from an analysis of the hydrological situation and possible impact of the right on upstream users to a full review of the historical aspect of the problem. It will be some time before this aspect of the case is finally briefed, argued and submitted to the court. However, in the interim, the Department of the Interior in preparation for further litigation has funded and is conducting numerous and extensive studies concerned with the restoration and maintenance of the Pyramid Lake fishery. A great deal of progress has been made on this matter since our last appearance before the subcommittee.

During the hearings in 1971 and 1972, attention of the subcommittee was directed to the potential conflict which exists between the administration of the affairs of the Government and the fulfillment of the trust obligation of the United States to the protection of trust resources of the American Indians. Specific questions were raised as to how litigation involving trust resources was conducted by the Lands Division. At that time, Indian resource litigation was conducted under the direct supervision of the General Litigation Section of the Lands Division. This section had responsibility not only for this type of litigation, but also for a multitude of other types of litigation involving Federal lands and waters, as well as certain suits brought by the various tribes and individual Indians against the United States or the responsible Federal officials.

In May 1975, the Attorney General created a new section in the Lands Division known as the Indian Resources Section. This section is responsible for litigation where the United States is acting in its trust capacity on behalf of the American Indians. At present, litigation under the auspices of this section is concerned chiefly with water rights, hunting and fishing rights, suits involving the protection of other types of Indian trust assets and the jurisdiction of Indian tribes to govern and control activities of their members within their reservations to the exclusion of state and local governments. While the creation of the new section has not eliminated the potential for conflict, it has resulted in creating a cadre of attorneys within the Department whose sole focus is on matters involving the fiduciary responsibility of the United States to the Indian tribes.

Turning now to the specific inquiry of this subcommittee. On March 24, 1976, the Supreme Court rendered its decision in *Colorado River Water Conservancy District, et al.* v. *United States* [74–940], heard together with *Akin, et al.* v. *United States* [74–949], or as we refer to it, the *Akin* decision. The following circumstances were involved. In November 1972, the Government filed suit in the Federal District Court in Colorado seeking to adjudicate *Winters* rights of two Indian tribes, and reserved rights on Federal lands, as well as other rights based on state law.

In 1969, Colorado adopted a statutory scheme for the adjudication of water rights in the State. Under this scheme, the State was divided into seven water divisions, each encompassing an entire drainage basin of one of the State's larger rivers. The adjudications in the seven divisions are on a continual or ongoing basis.

The suit brought by the United States in the Federal District Court involved the San Juan River and its tributaries, waters located within water division No. 7. When the *Akin* action was filed, the United States had not been served in any State water adjudication proceeding in water division No. 7. (However, the United States was involved in state proceedings in water divisions 4, 5, and 6, but no Indian *Winters* rights were present.)

In January 1973, the United States was served pursuant to the McCarran amendment (43 U.S.C. 666), in a State proceeding initiated in division No. 7 for the purpose of adjudicating all of the Government's water right claims, including those the United States holds in trust for the two Indian tribes.

On motion, the Federal District Court dismissed the proceeding initiated by the United States, deferring the adjudication to the state proceedings. The Circuit Court reversed, and the case found its way to the United States Supreme Court, which, while holding that the *McCarran* amendment did not repeal the jurisdiction of the Federal District Courts to hear suits for the adjudication of Federal water rights, nonetheless, went on to hold the *McCarran* amendment granted to the states jurisdiction over waters reserved on behalf of the Indians.[1] Thus,

[1] Whether or not this holding would be applicable in States with specific enabling act provisions excluding State jurisdiction over Indian rights is not decided. The Colorado enabling act does not contain such a provision.

we have the situation where water rights reserved to Indians by the United States (*Winters* rights) now may be determined and decided in state tribunals. Even when an action is already underway in Federal Court, the *Akin* holding permits, under proper circumstances, the Federal District Court to defer to state proceedings.

There is no dispute but that in the arid west it is now essential that rights to the use of water be determined. Water in this region is without doubt the most valued of resources, its availability fundamental to virtually all types of development and economic growth. Without a determination as to the legal allocation of water resources, full development and utilization cannot be achieved. The critical question is whether, as suggested in the *Akin* decision, Indian water rights should be judicially determined by the tribunals of the western states.

The fundamental policy that Indians be free of state jurisdiction is deeply rooted in the Nation's history. The Indian tribes obtained their property rights by virtue of dealings with the United States, and it has been a longstanding practice that such rights be determined in the Federal courts. Congress has permitted the exercise of State criminal and civil jurisdiction on Indian matters only after close scrutiny and then by a clear and concise grant of jurisdiction. The states have been in the past and remain today often the prime adversary in the effort to have these rights judicially recognized and protected.

A few very brief quotations taken from cases heard by the Federal judiciary serve to emphasize this point in its historical context. In 1886, the United States Supreme Court in *United States* v. *Kagama* [118 U.S. 375, 383–84], a case involving Federal criminal jurisdiction over Indians, stated:

> These Indian tribes *are* the wards of the Nation. They are communities *dependent* on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

In 1974, the Supreme Court noted in *Oneida Indian Nation* v. *County of Oneida* [414 U.S. 551, 678], that:

> There has been recurring tension between Federal and State law; State authorities have not easily accepted the notion that Federal law and Federal courts must be deemed the controlling considerations in dealing with the Indians.

Then in litigation involving the protection of Indian fishing rights in the State of Washington, the Ninth Circuit Court of Appeals[2] stated that:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court.

Almost without exception, it has been the states which have most strongly opposed the recognition of water rights reserved to Indians, and these efforts are fully supported by the various State engineers who often have quasi-judicial functions. It is true in the ongoing *Pyramid Lake* litigation. It is true in the litigation now being conducted in Montana to establish water rights for the Crow and Cheyenne tribes. It is true in litigation in the State of New Mexico, involving Pueblo water rights and other Indian water rights. It is true in the States of Washington and Colorado. If this examination were to include the full expanse of Indian trust assets, it would be shown that where major Indian rights are being asserted, the states are in general opposition to the recognition of such rights.

The reason for the attitude of the states toward Indian interests has many facets, but the record is clear: The states, who in theory at least have an equal responsibility to all of their citizens, uniformly side with the non-Indian interests against the Indian interests, today as they did 100 years ago.

Confronted with the *Akin* interpretation of the *McCarran* amendment, we now face the prospect of having the rights of Indians to use water, the singular most valuable resource of the Indian tribes in the west, determined in state proceedings. This prospect, coupled with the adverseness of the states to Indian

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[2] Concurring opinion of Judge Burns in *United States* v. *State of Washington,* 520 F.2d 676, 693 (C.A. 9, 1975).

interests, presents serious ramifications. The evidence in these proceedings would be taken before a local judge, often popularly elected from one or more counties, or a master appointed by him. This would be the level where evidence is heard and determined and review above this level is limited. Appeal would have to follow through the state appellate system, finally reaching the State Supreme Court. It is at this point, and this point only, where Federal review is available, but only by the United States Supreme Court upon grant of certiorari. As a result, we may be faced with a multitude of separate state interpretations of Federal law, and the applications of fact in accordance with that law with little opportunity for review by the Federal courts. Added to this is the fact that for years, he states have fought against recognition of so-called *Winters* rights. Now they are expected to ensure that such rights are fully recognized and protected. Perhaps everything will operate smoothly, but past experience is not encouraging, and review by the Federal judiciary, by the very nature of the system, is limited. Allowing Indian water rights to be determined in the Federal courts permits a full review of their claims in the Federal system, permits Federal courts to decide Federal questions, and ensures full and adequate protection of this most valuable resource of the tribes.

The underlying justification given for the exercise of state jurisdiction, even when Federal courts already have exercised jurisdiction over water determinations, is the need for a "unified proceeding." This justification is untenable. First, an explanation of what is involved in a so-called water adjudication. In such an adjudication, often 100 or more water rights are ascertained in a single action or continuing action. The purpose is, of course, to determine all rights to the use of water on a given water course. But in fact, a water adjudication proceeding is not one legal determination, but a separate determination of each and every right; it is simply a series of separate proceedings in which each claimant is required to establish the legal requirements necessary for the recognition of his right. This is true for the small user up to an irrigation district or the United States seeking a right for an Indian tribe.

Water adjudication proceedings often last years and, as in the case of those in the State of Colorado, are ongoing to reflect the changing status of water rights. But there is no need for the rights of the Indians to be adjudicated in the same proceeding with all other rights. What is actually important in water resources, in terms of "unification," is not where the rights are determined, but how they are administered afterwards. Unified administration is of utmost importance in water management. But the fact that one right is determined in a Federal Court and another in State Court does not mean that when the rights are administered, they cannot or should not be administered in a unified manner. A different tribunal does not mean that the rights cannot be administered together, for in fact the opposite is true and always has been. For over a century, the process of establishing water rights has been in motion, and it is common to have rights established in an early State Court proceeding incorporated into a later proceeding, and all rights administered together. So would be the case with Indian rights established in Federal Courts.

As a result of the Supreme Court's recent decision in *Akin* interpreting the McCarran amendment, we are now faced with the prospect of determining Indian water rights in State Court, a result which is neither necessary nor in the best interests of the Indian community.

Senator KENNEDY. Reid Chambers, Associate Solicitor of the U.S. Department of Interior is our next witness.

STATEMENT OF HON. REID P. CHAMBERS, ASSOCIATE SOLICITOR, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY SCOTT McELROY, ATTORNEY, DIVISION OF INDIAN AFFAIRS, SOLICITOR'S OFFICE, DEPARTMENT OF THE INTERIOR

Mr. CHAMBERS. Mr. Chairman, thank you. I am Reid Chambers, Associate Solicitor for Indian Affairs of the Department of the Interior. It is a welcome privilege to be here this morning to discuss the impli-

cations of the Supreme Court's recent decision in the companion cases of *Colorado River Water Conservation District* v. *United States* and *Akin* v. *United States*.

There have been a number of other cases in the Federal courts. I think it is fair to say that almost all Indian water rights adjudications prior to this date have been in Federal courts.

As you know, the *Akin* decision, among other things, held that the *McCarran* amendment to the Department of Justice Appropriations Act of 1953 grants to the courts of the various States jurisdiction to adjudicate the reserved water rights of Indian tribes.

Let me emphasize that in *Akin*, the Supreme Court was construing a Federal statute: the *McCarran* amendment. Congress, which shares the Federal trust responsibility to Indians with the executive branch, is free under the decision to alter its result by statute should it so desire. State court jurisdiction under *Akin* is theoretically concurrent to that of the Federal district courts. But the decision permits, indeed it may require, the Federal court to dismiss Indian water rights cases in certain circumstances.

Senator KENNEDY. You think they have equal jurisdiction; is that correct?

Mr. CHAMBERS. Yes, sir. It is a race to the courthouse. If a non-Indian gets to the State court first, it stays in the State court. If the United States gets to Federal court we may get bounced back to State court under a number of factors that were articulated by the Supreme Court in *Akin*, and, I might add, vaguely articulated. The standards are not clear as to when a case should be dismissed and when it should not be.

Senator KENNEDY. If it gets to the Federal court first, do you think the trend will be to move from the Federal court back to the State court? Do you think the Federal courts are going to say that under the *Akin* decision these cases should be heard in State court? Do you think this will be a problem?

Mr. CHAMBERS. I think it will be a problem. I agree with Peter Taft on that. The Federal jurisdictions vary in the West and there are some Federal judges that have been enormously protective of Indian rights. The normal Federal judge, faced with a case like *Pyramid Lake* where we are suing 14,000 defendants in his district, and which is a complex case that will take years of judicial time to adjudicate will want to get rid of that and put it into State court.

Senator KENNEDY. It is more likely that it will go back to the State than it would have been prior to this?

Mr. CHAMBERS. It is much more likely. The problem is the standards that the Supreme Court used in Akin are vague when dismissal will be permitted and subsequently sustained. Really we won't know the full impact for several years. We will be litigating those standards for several years in order to determine whether it is proper to dismiss a case in State court or not. It is unusual for a Federal district court to dismiss a case where it has jurisdiction. That is the problem in the *Akin* case.

Senator KENNEDY. Who wins in the race to the courthouse usually?

Mr. CHAMBERS. We are running with a peculiar kind of handicap. In the *Akin* case, we won the race to the courthouse. The United States filed the case before the United States was joined in water district No. 7, the district that is adjudicating the proceeding.

We have won the race in two cases in Montana. Scott and I worked nights to get those cases filed in Montana. We won those and we are now faced with motions to dismiss where we won the race. The States are citing *Akin* as support for dismissing those cases. Maybe I should go over the factors.

The Supreme Court discussed a number of factors which influenced its decision that dismissal was warranted. Most importantly, the Court interpreted the *McCarran* amendment as evincing a strong Federal policy to avoid piecemeal adjudications of water rights in a single stream system. In conjunction with that policy the Court found that Colorado had a comprehensive State system for the adjudication of water rights. The proceedings in water division No. 7, which antedated the Federal suit, were characterized by the Court as a single, continuous procedure, inclusive of all claims in that water division, even though the United States has not been sued in those proceedings prior to its filing of the Federal court case.

The Court also stated that it was influenced by :

1.) The apparent absence of any proceedings in the Federal district court after the filing of the complaint prior to the motion to dismiss.

2.) The extensive involvement of the Federal court in State water rights occasioned by a Federal suit naming 1,000 defendants.

3.) The fact that defendants would be required to travel 300 miles to appear before the Federal district court, and

4.) The already existing participation by the Federal Government in other proceedings in other Colorado water divisions.

Senator KENNEDY. Do you support the change in the *Akin* decision that the statutory language would give exclusive authority back to the Federal courts?

Mr. CHAMBERS. Senator Kennedy, I am not authorized to take a position for the Department.

Senator KENNEDY. I think I know what your personal position is.

Mr. CHAMBERS. My personal position would strongly support such a change. I think probably all of the Indian tribes in the country feel the same way. I think you have a couple of problems. One is that the *Akin* decision elongates these already protracted water rights cases.

For example, in the motions to dismiss in the Montana cases, whoever loses is going to appeal. The forum is all important. The forum is half of the battle, that is, getting the case in a Federal forum for us rather than a State forum. There will be appeals up to the circuit court.

Senator KENNEDY. In relation to this undisputed record of how important it is to go into Federal court, I know there is no doubt in your mind, but I just think someone who has spent a good part of their life in protection of both Indian rights and water rights, should feel that the history of State versus the Federal courts really compels the point that real protection can come within the Federal jurisdiction rather than the State jurisdiction.

Mr. CHAMBERS. Let me regress for a minute and become a law professor rather than the Associate Solicitor for Indian Affairs. Anyone who studies the history of Indian relations has to conclude that the whole basis for the constitutional provisions dealing with Indian tribes was to protect and assert a Federal protection over Indian tribes vis-a-vis the States.

When the Republic was founded—fortunately not your State of Massachusetts—States and particularly the Southern States were asserting broad powers to deal with the Indian tribes. The State of New York also was asserting such power. The Articles of Confederation basically permitted those States to manage Indian affairs. The reason for the constitutional provision to put that power in Congress was to make sure that the Indians were not discriminated against by the State governments and were given the protections of the Federal treaties with them. It is interesting that this has continued over the years.

Turning to the case of *United States* v. *Kagama*, about 100 years ago the Supreme Court said:

> These Indian tribes are the wards of the Nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

That was the Supreme Court in 1896. What is not recognized is that the Supreme Court in 1976 is constantly bombarded with cases of appeal from State supreme courts which are not worth the paper they are written on for protection of Indian rights.

I went over the last 4 terms of the Supreme Court and found that there have been no less than 10 cases that have had to be reviewed, and 9 of those 10 have been reversed, most of them 9:0, one of them just last week, because the State supreme courts have ignored the Federal principles and protections of Federal Indian law.

Mr. Taft referred to the situation in the State of Washington—one of virtual lawlessness of what the State courts are doing in that State. The State supreme court within the last 2 weeks has come down with a decision that is grossly violative of the U.S. Supreme Court decisions. Local State courts have issued injunctions against the enforcement of Federal court decrees in the State of Washington.

Senator KENNEDY. Are there many instances where the court does not give certiorari to adjudicate some of these cases? Are there a number of cases falling into the cracks?

Mr. CHAMBERS. There certainly are. I believe Mel Tonasket is going to testify later today. There was an important decision of the Washington supreme court a year ago which involved important questions the Supreme Court of the United States decided not to review. The Supreme Court can't review all of these cases. It can set general guidelines. The State courts are not even enforcing those guidelines. We had a decision this year by the Montana supreme court in a case called *Fisher* v. *District Court* where the Montana supreme court simply ignored three decisions by the U.S. Supreme Court within the last 5 years and came to a completely contrary result. In that case the Solicitor General was able to persuade the Supreme Court to give a summary reversal. But we can't do that in every case.

I think there is an analogy to the civil rights movement in the sixties. To me it seems you could not leave the rights of Black Americans to be protected by the southern State court systems. It was very important that the acts that Congress passed conferred Federal jurisdiction in a broad variety of matters to the Federal courts. But those were Federal court rights. State judges, even well-intentioned State judges, often have to face elections in some districts which are very

hostile to Indian rights. I don't think we are going to be able to do anywhere near as good a job protecting Indian rights if we are in State courts.

The other aspect is these are very protracted kinds of proceedings. The *Akin* decision is going to make them more protracted because of appeals, because of the vague standards. For example, it is not clear whether the *Akin* decision applies where the State water procedures are different from Colorado. It is not clear from *Akin* whether the decision applies to an interstate stream system like the Missouri River system or the Colorado River system. We don't know, for example, whether the case just applies where the State system has an ongoing suit on file, even when the United States has not been sued. We don't know what happens in a situation where we sue in Federal court and the State initiates a general adjudication in the State court. We don't know what happens when the State court is not close to the stream of water being adjudicated since in the *Akin* case the court was 300 miles away. There will be fights in every case. I think they will require 3 to 5 years of additional time for each suit. Myles Flint and Peter Taft have eight lawyers to handle all of our Indian cases.

We have over 200 Indian cases where we are suing to protect Indian rights, in land rights cases, jurisdiction, immunity from State taxation, and we have eight lawyers to handle those cases. If those lawyers are going to be tied up in endless appeals on this *Akin* decision, either the executive branch or Congress is going to have to provide us with more lawyers to do this job properly, or we will need some other kind of relief.

Senator, in closing, let me conclude my statement this way. There are a variety of reasons why the United States has in the past preferred to have Indian water rights and other Indian property disputes in Federal court. A primary reason is the legal issues to be resolved in such disputes are almost invariably questions of Federal law with which Federal judges have greater experience and expertise than do State court judges. This also involves questions that have never been settled by the State courts. For a State court adjudication of somebody's water right, you merely need to show an appropriation and a diversion for beneficial use. That is the kind of factual data you must show. In a Federal proceeding you have to show the purpose of the reservation, and how much land is in the reservation. You have to show the practical acreage in the reservation, when the irrigation is involved, and the history and culture of the tribe. Preparation of such cases also requires complex water inventories, stream flow studies, detailed soil classification studies of reservation lands with attention to such characteristics as texture, slope, alkalinity, salinity, topsoil depth, et cetera.

At the present time, for example, the Bureau of Indian Affairs is spending over $2 million to support studies to establish the reserved water rights of the Pyramid Lake tribe in a Federal district court case in Nevada.

In summary, Mr. Chairman, the implications of the *Akin* case for the just and prompt adjudication of Indian-reserved water rights are serious. The decision, because its standards are uncertain, will lengthen the already protracted water rights cases and will subject some Indian tribes to State courts which are unfamiliar with the reserved-rights

doctrine, or with the kinds of factual determinations which must be made to determine the extent of Indian water rights.

Mr. Chairman, this concludes my prepared testimony. I would be pleased to answer any questions which you or members of the subcommittee may have.

Senator KENNEDY. Would it be possible to provide exclusive Indian water rights in the Federal courts, and leave other kinds of water rights in the Bureau of Reclamation, and forestry issues in the State courts?

Can we reach the heart of this issue if we give the Indian water rights issue to the Federal courts?

Mr. CHAMBERS. I agree with Assistant Attorney General Taft that you can. That deals with the problem that these hearings are concerned with and that I am speaking about today. Usually, the Bureau of Reclamation does not have federally reserved water rights. Those arise under State law. But in the National Park Service system, the national forests have reserved rights, but they are much less than an Indian reservation rights because you are trying on an Indian reservation to provide a life, a culture, and an economic system for people.

In the National Park Service, you are not trying to irrigate massive amounts of land. Most of the Federal reserved water rights now in the Western States are Indian water rights. Those are the ones that are going to be most hotly contested because they are the ones that can cut off existing uses. Those are going to be the rights that ought most clearly to be heard in the Federal forum.

Senator KENNEDY. I want to thank you for your very helpful testimony. We will be in touch with you as we fashion some legislative efforts in this area. It was very helpful testimony.

Just before we recess for a few minutes, I noticed Bill Veeder in the back of the room when we came in. I want to state in the record how important his efforts have been in the whole area of water rights. Also, there is Hank Adams who has been in the forefront of hunting and fishing efforts in the Northwest, and also Forest Gerard from the Senate Interior Committee. We have always enjoyed working with him. We will recess for 7 or 8 minutes.

[Voting recess.]

[At this point Senator Abourezk is presiding.]

Senator ABOUREZK. The hearing will come to order. As I understand it, Mr. Chambers, you have completed your prepared testimony?

Mr. CHAMBERS. That is correct.

Senator Kennedy asked me a few questions while I was giving my testimony, and I would be happy to answer any you might have.

Senator ABOUREZK. I am going to ask Mr. Susman, who has been here throughout the hearings, to open with a couple of questions.

Mr. SUSMAN. Mr. Chambers, you described throughout your testimony the problems which Indians predict, and you join in their prediction that Indian water rights adjudication will face in State courts. Is there anything that the Interior Department or the Justice Department can do without legislation to try to remedy these prospective problems or is this something that will need congressional action, in your view?

Mr. CHAMBERS. Well, we can and we will try, Mr. Susman. I mentioned in my testimony the Montana cases where motions to dismiss have been filed and will be filed. We will certainly resist those motions to dismiss with every nerve and sinew at our command. The Justice Department will, too, but I think that the *Akin* case puts us on our own 5-yard line without much time to play. Certainly, it is the kind of matter that if the Congress felt its intention had not been effectively interpreted by the Supreme Court, Congress could change the matter by statute. There are a lot of alternatives available to Congress.

Mr. SUSMAN. In your review of the legislative history of the McCarran amendment, do you believe the *Akin* decision accurately reflects a conscious congressional intent to throw Indian water rights adjudication into State courts?

Mr. CHAMBERS. I was one of the attorneys in the case and I argued vigorously that Congress did not have that intent. I don't see it. I disagree with the Supreme Court. When a lawyer disagrees with the Supreme Court, that is one lawyer's opinion against nine justices, but I can't see that there is a conscious intent. The basic legislative history was that there was some testimony by the opponents of the McCarran amendment saying it might have this or that dire effect. The prediction of dire effects by opponents of legislation, under general rules of statutory construction, isn't entitled to much weight, if any weight at all. Of course, I must say after you write briefs like this and argue them, you become convinced that you are right. I think the Supreme Court is wrong. But the question is really what the intention of Congress is now. The *Akin* decision has created problems for Indian tribes and for the Federal Government as trustee and I suppose the real question is not what Congress intended in 1953 but what Congress intends at the present time.

Mr. SUSMAN. If Congress decides that it should redress the problem caused to Indian tribes by the *Akin* case, what should it do? What kind of legislative approach should it take: One specifically tailored to Indian rights as distinct from other Federal reserved rights?

Mr. CHAMBERS. You understand in answering this question, the administration has not taken an official position on the legislation. I would be suggesting some alternatives to you that are representing just my own views.

But I think it is important to have in mind that the rights of Indian tribes to the use of water under the *Winters* doctrine are different from other federally reserved rights. These are rights which are owned by the Indian tribes and the only role of the United States is as a trustee for the Indian tribes.

That is not true of National Park Service rights, or Forest Service rights, or any other kind of reserved rights. So it is proper, given that fact of the Indians being the full, equitable owner of the reserve water rights, to treat them differently from other Federal rights.

I think my own opinion is that the major kind of alternative available to Congress would be to bifurcate water rights adjudications and water rights administration of water decrees and to treat the Indian rights differently, have those adjudicated in Federal court. The United States, for example, could stay a party to the State court proceedings for the purpose of filing the other Federal rights in State courts. You could have coordinated administration. The State and its water users

could either be defendants in both the Federal and State court proceedings or alternatively the States could represent its water users in the Federal court proceedings much as it appears in the Supreme Court in cases like *Arizona* v. *California*.

You would not need to have a particularly complicated bifurcation. The United States could participate, and in the tribes if they wanted, could participate in the State court to argue against any non-Indian water rights that were being adjudicated there that they felt were excessive.

The States and the non-Indian water users could be interveners and participate in the Federal court proceeding and the decree filed in the State court so everybody would have notice of what the Federal rights were. But the critical matter is the factfinding and the legal interpretations of all the complex body of doctrine in Federal law. It ought, in my view, to take place in the Federal courts. There is one other aspect of this, Mr. Susman. The United States simply has a trust responsibility and that is its only responsibility with respect to the Indian rights since the ownership is with the Indian tribes. This sometimes creates a conflict of interest.

That also is a special problem with Federal law. Right now, for example, the United States has been sued in New Mexico with respect to its water rights on the San Juan River. The United States has some non-Indian water rights there and there are some Indian water rights for which the United States is a Federal trustee. There is probably a conflict of interest there. That is one of the 5 or 10 percent of the cases that Mr. Taft is talking about where there is a conflict of interest. It is hard to see that the United States can be said to represent those tribes in a binding sense in that adjudication on the San Juan River without the tribes being present.

The McCarran amendment does not waive sovereign immunity of tribes and no court has ever held that the tribes can be dragged into court for these proceedings. This is another area that needs clarification.

The *Akin* decision had a footnote in it that said Indian tribes were not necessarily parties to the State court proceedings under the McCarran amendment. The National Water Commission, a respected blue ribbon panel of Presidentially-appointed experts, recommended that exclusive jurisdiction for Indian water rights be in Federal court. That is the kind of approach that I would personally endorse. I would hope, eventually, after proper clearances, that the administration would endorse it.

Senator Abourezk. From the perspective of the U.S. Government, what would be the most desirable outcome, for the water rights cases to be tried in Federal courts or State courts?

Mr. Chambers. I think the impact of the decision basically creates a strong likelihood that most of these Indian water rights cases will be tried in State courts, is dramatically undesirable from the standpoint of the Federal trust responsibility to Indian tribes. It is a serious and toxic decision.

Senator Abourezk. What you are saying is that the Federal Government, its trust responsibilities will be greatly diminished if the cases were to remain in State courts?

Mr. CHAMBERS. I agree with you, Senator, on that. Mr. Taft, who testified earlier, and my own testimony is that the impact of this decision—and this has administration clearance—is very damaging.

Senator ABOUREZK. It would abridge the responsibility to allow it to remain that way?

Mr. CHAMBERS. Specific statutes were not cleared for me to comment on, but in terms of decision impact, it is an abridgement of the Federal responsibility to allow it to remain.

Senator ABOUREZK. Thank you, Mr. Chambers.

[The prepared statement of Reid Chambers follows:]

PREPARED STATEMENT OF REID P. CHAMBERS

I am Reid Peyton Chambers, Associate Solicitor for Indian Affairs of the Department of the Interior. It is a welcome privilege to be here this morning to discuss the implications of the Supreme Court's recent decision in the companion cases of *Colorado River Water Conservation District* v. *United States* and *Akin* v. *United States*. These cases involve an issue of vital concern to the United States and to all Indian tribes: the jurisdiction of state courts over Indian water rights, particularly those reserved under the *Winters* doctrine. It has been the consistent and longstanding position of the United States that determination of the extent and priority of water rights reserved for Indian tribes should only take place in the Federal courts.

In my opinion, there is no issue of greater concern to Indian tribes today than the preservation of their water rights. As this subcommittee knows from its own careful studies of this question, most tribes in the West are located in arid regions where life is only possible if water supplies are adequate. The Supreme Court recognized the importance of water rights to the continued existence of Indian tribes in the landmark case of *Winters* v. *United States*.[1] It held in *Winters* that the right to use water for the benefit of the Fort Belknap Indian Reservation was implicitly reserved in the treaties and agreements by which that reservation was created. The Supreme Court reaffirmed the *Winters* decision in the more recent case of *Arizona* v. *California*,[2] where it held that sufficient water had been reserved to the Indian tribes of the lower Colorado River to enable them to irrigate all their practicably irrigable land.

Until the Court's recent decision in the *Akin* case, the water rights of Indian tribes had been determined almost exclusively in the Federal courts. Among the representative Federal court cases involving Indian water rights have been the *Conrad Investment Co.* case in Montana,[3] the *Walker River* case in Nevada,[4] *United States* v. *Ahtanum Irrigation District*, in the State of Washington,[5] and, of course, the *Winters* case. At the present time there are nearly two dozen cases involving Indian water rights pending in Federal courts in the States of New Mexico, Arizona, Nevada, Montana, and Washington.

As you know, the *Akin* decision held (among other things) that the McCarran amendment to the Department of Justice Appropriations Act of 1953 grants to the courts of the various states jurisdiction to adjudicate the reserved water rights of Indian tribes. Let me emphasize that in *Akin*, the Supreme Court was construing a Federal statute—the McCarran amendment. Congress, which shares the Federal trust responsibility to Indians with the executive branch, is free under the decision to alter its result by statute should it so desire. State court jurisdiction under *Akin* is theoretically concurrent to that of the Federal district courts. But the decision permits, indeed it may require, the Federal court to dismiss Indian water rights cases in certain circumstances. These circumstances are but vaguely articulated in the Court's opinion, and will thus surely lead to further litigation. However, the Court's holding appears to establish a presumption in favor of state court adjudication of these critical Indian water rights. The upshot of *Akin* is a curious kind of race to the courthouse that goes not necessarily to the swift. If the state or a non-Indian claimant wins that race to

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[1] 207 U.S. 564 (1908).
[2] 373 U.S. 546 (1963).
[3] *Conrad Investment Co.* v. *United States*, 161 Fed. 829 (C.A. 9, 1908).
[4] *United States* v. *Walker River Irrigation District*, 104 F.2d 334 (C.A. 9, 1939).
[5] 236 F.2d 321 (C.A. 9, 1956), *cert. denied*, 352 U.S. 988; *Ahtanum II*, 330 F.2d 891, reh. den. (with opinion), 338 F.2d 307 (1964).

the state courthouse, he is assured of the forum of his choosing. If the United States, on behalf of an Indian tribe, wins the race to the Federal courthouse, we may, as happened in *Akin*, nevertheless, be sent back to the state courts.

In *Akin*, the United States brought an action in the Federal district court for the District of Colorado seeking a determination of its water rights and those of the Ute Mountain Ute and the Southern Ute Indian tribes. After the case was filed in the Federal district court, several defendants filed an application to join the United States in the already ongoing state court adjudication in Colorado Water Division 7. Subsequently, these defendants filed a motion to dismiss the action of the United States in Federal court on the grounds that the McCarran amendment, 43 U.S.C. section 666, which consents to the joinder of the United States in general stream adjudications in state courts, deprived the Federal court of jurisdiction. The district court dismissed, and the United States appealed, with the case ultimately reaching the Supreme Court. While stating that Federal courts have a "virtually unflagging obligation to exercise the jurisdiction given them" (slip opinion 16, citations omitted), and that "only the clearest of justifications will warrant dismissal" (id.), the Supreme Court held that "principles of wise judicial administration" supported dismissal of the case by the district court, even though that court clearly had jurisdiction to hear the case.

The Supreme Court discussed a number of factors which influenced its decision that dismissal was warranted. Most importantly, the Court interpreted the McCarran amendment as evincing a strong Federal policy to avoid piecemeal adjudications of water rights in a single stream system. In conjunction with that policy, the Court found that Colorado had a comprehensive state system for the adjudication of water rights. The proceedings in Water Division 7, which antedated the Federal suit, were characterized by the Court as a single, continuous procedure, inclusive of all claims in that Water Division, even though the United States had not been sued in those proceedings prior to its filing of the Federal court case.

The Court also stated that it was influenced by: (1) the apparent absence of any proceedings in the Federal district court after the filing of the complaint prior to the motion to dismiss; (2) the extensive involvement of the Federal court in state water rights occasioned by a Federal suit naming 1000 defendants; (3) the fact that defendants would be required to travel 300 miles to appear before the Federal district court; and (4) the already existing participation by the Federal Government in other proceedings in other Colorado Water Divisions.

Although the Court held in *Akin* that the Federal court should dismiss the suit, the decision raised a variety of questions with regard to the applicability of its holding to future suits. It does not appear that future cases will fall neatly within the standards utilized in *Akin* for deciding when dismissal is proper. What happens, for example, where the state does not have an ongoing suit on file at the time the United States files its complaint, or when the Federal court is relatively close to the stream of water to be adjudicated? Does *Akin* apply to water adjudications on interstate stream systems?

Given the desire of the states to litigate in state court and the United States to litigate in Federal courts, and the uncertainties created by the vague *Akin* standards, in initial battle will have to be fought in virtually every future water rights case to determine in which forum the real battle will take place. These fights will be long and costly, requiring an additional 3 to 5 years for each suit and a concomitant expenditure of scarce attorney time and money.

There are a variety of reasons why the United States has in the past preferred to have Indian water rights, and other Indian property disputes, decided in Federal courts. A primary reason is that the legal issues to be resolved in such disputes are almost invariably questions of Federal law with which Federal judges have greater experience and expertise than do state court judges. In addition, Federal appellate review of these cases is more easily obtained when they are heard in a Federal forum in the first instance. Although it is true that state court decisions involving questions of Federal law are ultimately subject to review by the Supreme Court, it is unrealistic to assume that the Supreme Court of the United States will be able to closely scrutinize all Indian water rights cases that may be presented for review by Indian tribes. Even in those instances where such review is obtained, the final determination of any water rights case is heavily influenced by the facts ascertained at trial, and those facts are only subject to limited appellate review.

It might be supposed that these same objections could be raised by any non-Indian water rights litigant in State court proceedings, but that is not the case. Generally speaking, a non-Indian water user in the Western states need only show a diversion, a beneficial use, and the date of diversion in order to be vested by law with an appropriative water right as of that date. These matters are exclusively state law issues. Indian reserved water rights claims rise under Federal law and must be supported by expensive and lengthy scientific studies as to the purpose for which the reservation was created, the amount of "practicably irrigable" acreage upon it, when irrigation is involved, and the history and culture of the tribe.

Preparation of such cases also requires complex water inventories, stream flow studies, detailed soil classification studies of reservation lands with attention to such characteristics as texture, slope, alkalinity, salinity, topsoil depth, etc. At the present time, for example, the Bureau of Indian Affairs is spending over $2 million to support studies to establish the reserved water rights of the Pyramid Lake tribe in a Federal district court case in Nevada.

In summary, Mr. Chairman, the implications of *Akin* for the just and prompt adjudication of Indian reserved water rights are serious. The decision, because its standards are uncertain will lengthen the already protracted water rights cases and will subject some Indian tribes to state courts which are unfamiliar with the reserved rights doctrine or with the kinds of factual determinations which must be made to determine the extent of Indian water rights.

Mr. Chairman, this concludes my prepared testimony.

I would be pleased to answer any questions which you or members of the subcommittee might have.

STATEMENT OF PAUL L. BLOOM, GENERAL COUNSEL, NEW MEXICO STATE ENGINEER AND INTERSTATE STREAM COMMISSION

Mr. BLOOM. Thank you, Senator. I appreciate the opportunity to be here this morning. I am glad to talk to you and put into the record my views and those of the State of Mexico. I am afraid I will have to sound a couple of discordant notes in light of the testimony that has gone before.

I am counsel of record for the State of New Mexico and a Special Assistant Attorney General for New Mexico. New Mexico now has pending, on two streams in the State water rights adjudication suits in State court, the kind of suit you were just talking to Mr. Chambers about. I necessarily take a radically different view of the significance and posture of those cases than Mr. Chambers and Mr. Taft have done. I would summarize, if I may, a statement which I have already submitted to the record on adjudication of Federal Indian water rights for the hearings today.

The *Akin* case, the name we put on the consolidated cases of *Colorado River Water Conservation District* v. *United States*, and *Mary Akin* v. *the United States*, in the simplest terms, has made possible by a Supreme Court interpretation of the McCarran amendment, made it possible for those State courts which act under stream system adjudication statutes to entertain and adjudicate Federal claims for reserved Indian water rights in State courts.

Senator, you and Senator Kennedy have heard statements from Justice and Interior expressing grave regrets over that decision and its implications. I differ strongly with those views. The summary of New Mexico's position is that the State courts of New Mexico and other Western States with other similar practices and powers are a fair, reasonable, effective, and expeditious forum for the determination of Federal and State rights.

It is uniquely a characteristic of the adjudication of water rights in the West, that water rights are all interrelated on a common stream. They must as a practical and legal matter be adjudicated in the same court for reasons of convenience, fairness, cost to all parties and to the integrity of State decrees resulting from decades of tedious and expensive work in State courts.

I stress that last point, the protection of those State decrees, and it is important that the Congress not attempt to set aside the *Akin* decision. Let me note first, if I may, what the *Akin* case did not say. It did not say that Indian water rights are or will become subject to State law. This is a misunderstanding that has been spread about the West by some shallow newspaper coverage of the *Akin* decision.

The Supreme Court has not set aside the *Winters* doctrine and has not expanded State jurisdiction. It has said that the State courts in appropriate situations under well established principles of the common law based on concurrent jurisdiction, priority of filing, the intention of Congress in the McCarran amendment, that is, that under this principle, State courts in certain situations, in omnibus adjudications, where these are other ongoing or where the United States sued in the State court before the United States files, then in those situations that is the appropriate forum.

It has made, in my opinion, crystal clear, the Supreme Court has, that the substantive law can be applied by the State courts and is exactly the same law as is to be applied if the suit is brought in Federal court.

The issue of Federal court jurisdiction and the claims or suggestions made on the basis of personal opinion today by Federal representatives to the effect that the Congress would be well advised to modify or set aside the Supreme Court decision by amendment to the McCarran amendment are unwise and in a sense reflect a false issue.

They tend to suggest that the State courts in the Western States, out of hostility or bias or ignorance or inexperience, are not a suitable or equitable forum for applying the same rules of law which the Supreme Court has said Federal and State courts must apply in the important area of reserved water rights for Indians.

The State of New Mexico does not dispute the existence of reserved Indian water rights but we say in certain cases and only where those important criteria are met, economy, convenience of all parties, equities, in those situations it is important to allow the State courts to apply those same rules by reading the same Supreme Court decisions a Federal court would read, subject, of course, to review in the same U.S. Supreme Court which would ultimately review a Federal court decision.

Let me point out that the rule of the *Akin* case is not a very novel one in New Mexico. The State of New Mexico, to some extent, anticipated this result, acting in the belief that the *Eagle County* decision of March 1971 had strongly implied that the McCarran amendment was an all-inclusive statute and intended, in appropriate cases to subject all claims to State courts.

Therefore, in reliance on the *Eagle County* case, the State of New Mexico, prior to *Akin*, had caused two suits to be brought or enlarged in which Indian water rights are implicated. Those are the *Lewis* case in New Mexico involving the Hondo River, and the San Juan River,

a case in New Mexico State Court for San Juan county. It involves water rights of the Navajo Indian tribe and the Ute Mountain Indian tribe, and the Jicarilla Apache tribe. Neither of these has come to a decision on the merits or is anywhere close to a decision on the merits of the nature, extent, and the priority of Indian water rights.

It would not be appropriate for me as counsel on those cases to talk about the positions of the parties on the merits. I won't do that. I am here to say and I do say that it is a red herring and a false issue to constantly belabor the point that the State courts are somehow constitutionally unable to accommodate the application of Federal law in this area.

It has been stated earlier that there is something uniquely Federal, that requires Federal adjudication of Indian water rights. I don't see that there is anything more uniquely Federal about Indian water rights than about National Forest reserved rights and National Park rights. The United States has been in this State forum for 19 years in the *Lewis* case. That is the same doctrine arising out of the same *Winters* case. We have never had a complaint in 19 years of litigation in New Mexico in the *Lewis* case that the State courts were biased, or prejudiced, or incompetent, or too ignorant to handle these. It is only when it comes to Indian claims. I suggest with all respect that there is almost an irrational element in the criticism of State courts in this area. There is a psychology I feel among the Indian people and I don't dispute the sincerity of it for a moment, that the States and many of their institutions are hostile to the Indian people. To some extent this fear is kept alive by persistent jurisdictional disputes and the increasing desire of the Indian tribes to govern themselves and to rule their own reservations, a very understandable ambition but one which must necessarily, in some cases, conflict with the States' own views of their needs to protect the welfare and health of their own peoples—all their peoples generally.

The State courts of New Mexico, in dealing with Indian water rights, must apply the same standards, the same substantive law subject to the same review in the U.S. Supreme Court that would come from a Federal district court.

For these reasons, it seems to me quite unfair and really amounts to a gross generalization and almost a slanderous generalization to state that the Western States courts are in the same position as would be, say, the way we would characterize the State courts of Southern States in the agony the United States went through in enforcing civil rights laws in the former Confederate States.

Senator Abourezk. Do you have a comment on Mr. Chambers' testimony regarding cases of hunting and fishing rights in the Northwest? Did you hear his testimony?

Mr. Bloom. Yes.

Senator Abourezk. Does that have any impact on what you are saying now?

Mr. Bloom. No; because I have read the Ninth Circuit cases and the U.S. Supreme Court cases on the treaty fishing rights of the Indians in the State of Washington. It is inconceivable to me that any State court, district, or State supreme court could seriously attempt to abridge rights definitively established for Indian people by Supreme Court interpretation. States cannot do that.

Senator ABOUREZK. But they did.

Mr. BLOOM. That is the accusation of Mr. Taft. You have not heard from the other parties and it might be premature to have any fixed judgment based on the characterization of an attorney speaking from the point of view of an advocate.

Senator ABOUREZK. Does it mean anything at all that 9 out of 10 of those cases have been reversed by the Supreme Court and most of them by 9 to 0?

Mr. BLOOM. Indian law is court-made law and it is a matter of interpreting some vague guidelines given. The Ninth circuit has been overruled in Indian cases but so have the Tenth circuit and State courts. You have a single statistic taken out of context and it has been argued from that that the State supreme courts are uniformly hostile.

I don't think that is true. You would have to say that because the Ninth and Tenth circuits are sometimes overruled, that they are hostile to Indian rights. The Supreme Court gives us very difficult guidelines to follow. Mr. Chambers has just finished telling us how difficult the *Akin* case is to interpret and to apply from Colorado to New Mexico, Washington, and Wyoming. If that is true in *Akin*, how much more is it true in other areas?

Senator ABOUREZK. You have made a statement that will serve as a prelude to the questions I want to ask. You said that these laws are all subject to interpretation which is a question I was going to ask you and you answered it ahead of time. Obviously each judge will interpret the precedent and the statutes and the constitution as he sees fit. They may in many cases be different.

Mr. BLOOM. That is true of Federal judges as well as State judges.

Senator ABOUREZK. Any kind of judges. All right now. The former Governor of New Mexico wrote to Commissioner Rhodes. It must be evident to anyone acquainted with political conditions in New Mexico that it would be very difficult, indeed, for anyone in high public positions to support the proposition that the Indians have prior rights over non-Indians to any water at all. Do you agree or disagree with that concept?

Mr. BLOOM. Not only do I disagree with it but I have acknowledged the contrary in our cases, in our pleadings, and in the *San Juan River* case I just talked about filed in State court. I have acknowledged in the complaint that the United States claims rights under the *Winters* doctrine, that those rights arise under the Constitution of the laws of the United States and those must be interpreted by a State as well as a Federal court. The Governor was Governor of New Mexico 60 years ago. New Mexico has evolved a good deal. Congress has changed the rules of the game as far as the relations of Indians to non-Indian peoples, obviously. The trusteeship of the United States over its Indian people is more aggressive, far reaching, certainly more aggressive today than it was in 1912 when New Mexico became a State.

Senator ABOUREZK. I wonder if you are familiar with the *Pueblo* case, the 1926 law that was passed which denied the Pueblo any right to negotiate; you are familiar with that?

Mr. BLOOM. I am generally familiar with the statute.

Senator ABOUREZK. You are aware at the present time we are trying to get that statute repealed. We are having one of the fights of our

lives with the New Mexico delegation on the House side. You are aware of that, are you not?

Mr. BLOOM. I have not been involved. I know opinion is mixed in New Mexico.

Senator ABOUREZK. I have been involved in the fight and I can tell you that as far as the congressional delegation is concerned, times have not really changed so far as that is concerned. It is difficult for someone in high office in New Mexico, as well as it is in South Dakota, to try to provide this kind of treatment for the Indians.

Mr. BLOOM. Is it not true that the bill was introduced by New Mexico's delegation?

Senator ABOUREZK. It was introduced by Senators Domenici and Montoya.

Mr. BLOOM. Without getting involved in specifics of that which is not the subject of hearings today, there are two factors to be considered. One is that several Pueblos are adjacent to the major cities of Mexico. If it is not possible to condemn rights-of-way over their land, some believe it will be impossible for REA's or the highway department to do their job or they will have to pay outrageous compensation awards. In the absence of that condemnation power, they have to negotiate with the Indian tribes.

Senator ABOUREZK. That is presuming a mantle of irresponsibility on the Pueblos though you don't presume on anybody else.

Mr. BLOOM. No, sir. If I were a Pueblo and knew that I owned a strategic block of land and somebody asked for a right-of-way and they could not condemn it, I would hold out for a very good price.

Senator ABOUREZK. How are State court judges in New Mexico selected?

Mr. BLOOM. They are either initially named by the Governor and then elected or subject to election.

Senator ABOUREZK. They are all at one time or another subject to election?

Mr. BLOOM. Yes, sir. In New Mexico, the American Indian population is more than 7 percent of the State population, 7½ to 8 percent now.

Senator ABOUREZK. It is about 7 percent.

Mr. BLOOM. In any case, in the areas where these suits are brought as it happens, take San Juan County—the Navajo reservation occupies a large part of San Juan County. A substantial percentage of the population of that county, with the full opportunity to cast their ballots for State judges, are Indian voters.

Senator ABOUREZK. Are there any Indian judges there?

Mr. BLOOM. There are none and I think there have never been.

Senator ABOUREZK. Would you agree with this statement that the water rights are extremely important to the non-Indian citizens of New Mexico?

Mr. BLOOM. I assume they are important to all our citizens.

Senator ABOUREZK. But they are important to all the non-Indians?

Mr. BLOOM. As well as the Indians.

Senator ABOUREZK. It would be helpful if you would respond directly. If non-Indian water rights are determined by a judge to be inferior to Indian water rights, and city populations had to cut back on water use or forego expansion, do you think that a State court

judge who made the decision to give the Indians superior water rights would be reelected?

Mr. BLOOM. I think he could be because our judges do that sort of thing every day. Your question has a premise which departs a little from reality in New Mexico. We are accustomed to seniors calling water right priority on juniors. We are a prior appropriate State. It is not extraordinary in New Mexico for a judge to have to make that very difficult choice of preferring one area over another.

Sometimes they involve larger population groups than our Indian population. We have a priority fight going on now. The State engineer has announced he will enforce that. There is a probability of drying up a very substantial acreage. The judge will have to do his duty regardless of the political consequences.

The same would apply to a decision in favor of the Indians. Our State judges have made decisions in favor of the Indians. I point out that it was in a State court of New Mexico, Senator, that our State judge ruled that he lacked jurisdiction under the McCarran amendment before the *Akin* case came down, and it was our Federal courts that ruled the contrary before the *Akin* case. You had a clear, split decision. It was a State court that ruled the Indian way the first time.

Senator ABOUREZK. That ruling does not deprive anybody of water rights.

Mr. BLOOM. No; but it was a matter of great concern to the parties in that case. The State judge made that ruling.

Senator ABOUREZK. Have you had any experience to indicate that the Federal courts are not capable of fairly adjudicating Indian water rights?

Mr. BLOOM. Only to the extent that the Congress has starved the Federal courts of manpower and resources to do their job. We have, perhaps uniquely in the West, a large number of water rights adjudications involving Indian rights in both State and Federal court. We are perhaps with all modesty uniquely in a position to comment on the treatment that we receive and that all the people of New Mexico receive in both forums. Now we have seven cases in Federal court involving tributaries of the Rio Grande. We have now four Indian reservations involved in State court adjudication.

I speak with absolute sincerity in saying my experience is that both courts are equally anxious and willing to provide fair hearings for all classes of claims whether they arise under Federal or State law.

I am confident they will continue to do that. The problem is that the Congress or this subcommittee is talking about laws which would make these exclusively Federal. Now if you do that, at the same time that you are starving the Federal courts of adequate manpower and resources, we have over 45 State judges in New Mexico and we have only three Federal judges. They are complaining about the backlog in their dockets. Mr. Chambers also said the Federal judges have unique knowledge. They don't hear these cases in the first place. They are so busy, they select private attorneys to serve at $150 a day whose fees are paid by the parties, to entertain these questions because the Federal courts don't have resources and have month-long docket backlogs.

I am responsible for part of that because we have 8,000 parties in Federal court actions involving Indian water rights among others.

Those include the *Pueblo* cases. In all these situations, the Federal courts have been fair and as expeditious as they can be given the resources they have. So have our State courts when Indian water rights have been brought before them.

Senator ABOUREZK. Do you view the *Winters* doctrine as establishing a clear Indian right?

Mr. BLOOM. I recognize that in appropriate situations such as reservations made by treaty, congressional act or executive order, that fit the criteria of the *Winters* doctrine and its line of cases, that there are reserved Indian water rights implicitly made in amounts such as to satisfy the purposes for which the reservation was made.

We know from *Arizona* v. *California*, for five Colorado tribes, that this right was subject to quantification based on practicably irrigable acreage. We do not know whether that standard will be applied to all other reservations. The U.S. Justice Department has claimed a better priority in our State cases. It has claimed a prehistoric priority. I would have to qualify it that way. There are certainly many other points in the *Winters* doctrine, around the edges, which are not settled, whether the doctrine applies to underground as well as surface waters, questions of that kind. The doctrine exists and the State courts acknowledge that.

Senator ABOUREZK. Do you believe that Indian tribes have *Winters* doctrine rights whether or not they are adjudicated then?

Mr. BLOOM. A person can have a right before it is adjudicated.

Senator ABOUREZK. It does not really establish the Indian rights which are inherent?

Mr. BLOOM. A suit doesn't create rights. It just defines them.

Senator ABOUREZK. In the State court of New Mexico would they be hampered if the date of priority and the rights of Indians were to be set by Federal court?

Mr. BLOOM. That assumption raises serious constitutional problems, Senator. I note Mr. Chambers and Mr. Taft both speculated on the possibility that the Congress could carve out by legislation the subject matter of Indian water rights and then have them sort of melded into State court decree. I don't believe that that is constitutionally possible for the reason that every other claimant on those streams is entitled to notice and opportunity to dispute. The State is merely a stakeholder.

It does not claim to own the water rights involved. The owners are those hundreds or thousands of the non-Indians—upstream or downstream—who may feel an economic threat from the assertion of Indian rights.

It would be a taking of property without due process. I believe the U.S. Supreme Court has recognized this in *Eagle* and in *Akin* and has said again and again quoting Senator McCarran's remarks that all water rights on the stream are interrelated.

All claimants are necessary and indispensable parties and if this Congress is being asked to deny the private parties that opportunity, I believe that such legislation would be arguably unconstitutional.

Senator ABOUREZK. I don't know that you are speaking to the question. What we are talking about is the establishment of rights that already exist on the part of the Indians.

Mr. BLOOM. In an adversary proceeding, Senator.

Senator ABOUREZK. Right. If it is an adversary proceeding, the non-Indian would be in the Federal court.

Mr. BLOOM. I understand from what Mr. Taft and Mr. Chambers were saying that somehow the State would be dragooned into the Federal court, as in what was called the Kiechel bill, and the theory would be that the State could be compelled to speak for all of its non-Indian citizens as a kind of parens patriae.

An attempt has been made along this line in two Federal district courts and it has been repudiated in both. In the *Santa Cruz* case and the *Pyramid Lake* case, the Justice Department has attempted to accomplish this end, to eliminate the need to give notice to, to serve and join a thousand or ten thousand parties and simply say we will serve the attorney general and Governor of the State and that will be the end of it.

The other parties, even though they can be adversely affected, would not be entitled to come into Federal court. There will be a private Federal-State adjudication and then we will take this as an accomplished fact and sew it onto the State decree at the top or the bottom. In my opinion it does not make sense and it is a complete reversal of the rationale of the McCarran amendment which was precisely designed for the purpose of subjecting all Federal claims to adjudication in a common single omnibus suit so that all parties could have a due process opportunity to litigate their right in the same forum.

Senator ABOUREZK. Do you believe that the Federal court is the proper forum for the adjudication of Federal Indian treaty rights or should it be in State courts?

Mr. BLOOM. In certain circumstances, Federal Indian treaty rights may be adjudicated in either court and have been.

Senator ABOUREZK. The treaty was made between the United States Government and the Indians. How could it be done in a State court, that is, the adjudication of treaty rights?

Mr. BLOOM. Sometimes the Indians win.

[Laughter.]

Senator ABOUREZK. Please!

Mr. BLOOM. Every time a jurisdiction case arises over the power of the State court or application of State law to persons on the Navajo reservation, the Navajo people have a treaty with the United States Government. The State court must look at that, article 21 of the State Constitution, a portion of our enabling act, subsequent Federal cases, and decide which side of the line this case falls on.

Senator ABOUREZK. That is not treaty rights, it is a determination of jurisdiction. It is not an adjudication of treaty rights.

Mr. BLOOM. I don't see any reason why State courts are not as clearly enabled as anyone else to apply Federal law. They apply Federal law every day in appropriate cases. Treaties with Indian tribes are simply a particular species of Federal law.

Senator ABOUREZK. Isn't that against our entire tradition?

I believe it is probably in the jurisdictional statutes themselves in treaty rights, that dealings with Indian tribes are exclusively in the province of the Congress. That is in the Constitution. The jurisdictional matters relate directly to that. I believe that you don't really

mean that when you say that treaty rights are adjudicated in State courts because they are nolle and you know they are not.

Mr. BLOOM. They will be in the area of Indian water rights under the *Akin* case.

Senator ABOUREZK. Yes, if it stands, that is right. I don't have any more questions. I want to thank you very much for your testimony.

[The prepared statement of Mr. Bloom follows:]

PREPARED STATEMENT OF PAUL L. BLOOM

The March 24, 1976 decision of the U.S. Supreme Court in the consolidated cases of *Colorado River Water Conservation District* vs. *United States*, and *Mary Akin* vs. *United States* (referred to hereafter as *Akin*) has definitively established that the courts of those states whose laws provide for general stream adjudication suits are empowered to adjudicate "Indian water rights" owned by the United States. It is the purpose of this statement to place the *Akin* decision in its proper factual and legal context and to suggest that the rule of *Akin* will allow expeditious and effective water rights adjudication without prejudice to the legitimate interests of the Indian or non-Indian peoples of the Western States.

It is appropriate, in the first place, to note carefully what *Akin* does not say. It does not establish that "Indian water rights" (by which I mean tribal water rights arising out of the "Winters doctrine"[1] are or will become subject to "state law" in the sense that the nature, extent, priority, purpose, etc., of tribal water rights are to be adjudicated, or thereafter administered, under the principles and procedures of state water law. As the Supreme Court said in *Akin:* "The [McCarran] amendment in no way abridges any substantive claim on behalf of Indians under the doctrine of reserved rights." On the contrary, the Supreme Court affirmed in *Akin*, as it had previously noted in *Eagle County* (*U.S.* vs. *District Court for Eagle County*, 401 U.S. 520, 1971), that Federal reserved rights subjected to adjudication in appropriate state court proceedings must be determined pursuant to "Federal law," that is, to the Federal decisional and/or statutory law known as the "Winters doctrine." Likewise, the Court did not hold that the exercise or enjoyment of "Indian rights" after adjudication is subject to the requirements of state administrative law, for example, the procedure by which one initiates an appropriation or seeks a partial or complete transfer in the place, purpose or point of diversion of a water right by application to the state engineer or to a board of water commissioners or similar state administrative body. Of course, the McCarran amendment provides in substance that, once duly joined as a defendant, the United States is barred from claiming that it is not bound by the decrees of an adjudication court (except as to money judgments), but it is at least far from clear that this language would allow a state adjudication court to subject adjudicated "Indian water rights" to general state administrative law. It is my view that, once adjudicated, Indian water rights will be subject to state administrative law only to the extent that the courts decide that the respective states may otherwise exercise governmental power over Indian property, within or without the boundaries of Public Law 280 and other relevant statute and case law.

There are now pending in New Mexico State courts two cases in which the rights of one or more Indian tribes are pending judicial determination: the first of these is the case of State ex rel *Reynolds* vs. *L.T. Lewis, et al.*, Rio Hondo section, (Mescalero Apache tribe), and the second is State ex rel *Reynolds* vs. *United States, et al.* (the Navajo, the Jicarilla Apache and the Ute Mountain Ute Indian tribes). The former involves adjudication of the Rio Hondo, a Pecos River tributary, and the latter is a suit to adjudicate all water rights claims in the San Juan

[1] In the simplest terms, the "Winters" (*U.S.* v. *Winters*, 207 U.S. 564 (1908)), or reserved rights doctrine (cf. *Arizona* v. *Cal.*, 373 U.S. 546, 1963) holds that when the U.S., by treaty, statute or Executive order reserved land from the public domain for a specific Federal purpose, e.g., an Indian reservation, or a national park or forest, the courts will construe the reservation of land as containing an implicit reservation, from unappropriated waters of streams traversing or bounding that land, of sufficient water to give effect to the purposes for which the land was reserved. Many important questions remain to be settled by the courts in respect to the nature, extent, priority and administration of such Federal rights.

River system in New Mexico.[2] These cases provide useful illustrations of the promise and the problems of the *Akin* decision.

It should be noted first that state and Federal courts in New Mexico had already ruled, before *Akin*, that "Indian water rights" could be adjudicated by State courts, in appropriate stream system adjudication suits, where the United States had been properly joined, as a McCarran defendant, in its capacity as trustee for Indian resources. In the *Lewis* case, the New Mexico Supreme Court ruled on February 9, 1976, that the Mescalero Apache Indian water rights in the Rio Hondo system were properly before a state district court, and in the *New Mexico* vs. *United States* case, a Federal district judge in Albuquerque had ruled on October 23, 1975, that the United States was properly before another state district court in its capacity as fiduciary of Indian property. Thus, the *Akin* decision merely confirmed a legal status quo previously established in New Mexico.

In both of these cases, Indian water rights owned by the United States were brought within the purview of state court adjudication for the paramount reason that either ongoing or previous water right adjudication in State court had implicated the rights of hundreds or thousands of New Mexico water users, and adjudication of "Indian water rights" in separate and new Federal court proceedings would have jeopardized the finality of previous State court decrees and caused other significant injuries to many water users. For example, in the *Lewis* case, 20 years of State court water rights adjudication had transpired before the "Indian water rights," involving an upstream tributary, were brought into the case. More than 2,000 individual orders defining the nature, extent and priority of non-Indian rights had been duly entered in in that case before the Indian claims were brought before the court, and a partial final decree confirming those orders and making them effective between and among the parties had been entered. If the McCarran amendment had been held not to permit the adjudication of the United States' claims for the Mescalero Apache tribe in the *Lewis* case, the private water users in the case, and the State Engineer, would have been faced with the 'Hobson's choice' of either (1) proceeding to adjudicate only non-Indian rights and, thus, leaving a very substantial landowner, the Indian tribe, free to divert and use whatever waters it desired to take in the headwaters of the stream, and, thus, render the final adjudication decree nugatory; or (2) initiating a new and distinct action in Federal court seeking a "readjudication" of everything laboriously accomplished over 20 years in State court, with all the risks that course entails and all the additional costs to the parties, in order to obtain a comprehensive decree. The situation was perhaps even more clear and demanding in the San Juan River system (*New Mexico* vs. *United States*); here, a State court had, between 1927 and 1948, adjudicated all the then-existing non-Federal water rights (the U.S. could not be joined because the suit was closed before the enactment of the McCarran amendment). If the State Engineer had not been free to cause the joinder of the United States as a defendant in its own right and as owner of Indian water rights, in State court, it would have remained impossible for the engineer to administer effectively the waters of the San Juan River until and unless he secured the readjudication of all those same private rights, and all Federal rights, (including those claimed under the 'Winters Doctrine') in a new Federal court action.

The latter course would again have imposed serious burdens on many hundreds of water users, and brought into question the finality of the 1948 state court decree. If no further legal action were taken, the continuing lack of power in the State engineer to administer the entire stream would very possibly have resulted in injuries to interests of the Navajo Indian tribe, whose existing water

[2] The Tenth Circuit Court of Appeals has held, and the Supreme Court has not disagreed, that where both State and Federal courts have concurrent jurisdiction to determine water rights on a stream system, priority in time of filing will be a critical factor in determining which court will finally adjudicate the rights. The resulting "race to the courthouse" is not an ideal method of settling which court system should exercise jurisdiction; however, it does provide a means by which a tribe, or the Department of Justice, whenever it feels that circumstances require it, can probably secure a Federal forum for litigation of Indian or other Federal rights. Of course, *Akin* illustrates that priority is not the only factor; the Supreme Court ruled there that it was more convenient to add one party (the U.S.) to an existing State court adjudication than to add 1,200 private parties to a Federal court action brought by the United States, although the United States filed in Federal court before it was joined as a defendant in State court. The Justice Department has recently brought Federal court adjudication suits on behalf of, inter alia, Indian claims, in Montana, Arizona, and Oregon. In the *San Juan River* case in New Mexico, the United States has twice sought to remove the case to Federal court, and has been twice rebuffed by the Federal court.

uses include irrigation projects downstream from all adjudicated private users of San Juan system waters.[3] In the San Juan River case, concern for the interests of both the Indian and non-Indian water users produces the same conclusion: that the entire stream system in New Mexico should be readjudicated in the same State court that entered the first decree, so that, with a minimum of risk, expense and inconvenience to all parties, all Federal and private rights could be adjudicated and then administered under a single decree.[4]

It is perhaps appropriate here to discuss briefly the well-known objections of many Indian representatives to the adjudication of water rights in State court. These objections arise out of a deep and sincere conviction that state courts, quite apart from the legal niceties of the McCarran amendment, Public Law 280 etc., are hostile, or at least unsympathetic, forums for the determination of Indian water rights. It is certainly not my intention to argue that the inconsisent, neglectful and sometimes shameful treatment of Indian people and property after the arrival of European settlers in what is now the United States has not provided ample cause for the surviving Indian people of the United States to exercise the most scrupulous and sensitive care over their valuable property rights. However, I do contend that it would be anachronistic to ignore the very extensive legal and social evolution of the relationship of Indian to non-Indian people that has occurred in recent decades in the United States. Perhaps most importantly for the problem at hand, the U.S. Supreme Court has firmly established a doctrine of Federal law governing the water rights of Indian reservations, and has, as noted above, explicitly enjoined State tribunals to follow this doctrine in appropriate cases. Indeed, it has also gone farther, and explicitly stated that the decisions of State tribunals on Indian water rights will present Federal questions reviewable by that court. It is certainly unjustified, in this age of aggressive assertion of minority rights, Federal civil rights legislation, and increasing Indian political strength in many western States, to anticipate that State courts, in the face of this Supreme Court admonition, will deny "equal justice" to Indian citizens. The Supreme Court answered a similar argument in *Akin* in these words:

> Moreover, the Government's argument rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.

In conclusion, this situation now exists: the Congress, in the McCarran amendment, recognized the unique and overriding need in water adjudication suits to have all Federal and private claims litigated and then administered under a common decree; the Supreme Court has said that the amendment includes the right and power of state courts to adjudicate Federal reserved rights, including

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[3] There is, of course, no Federal "watermaster" or other administrator generally empowered to administer private and U.S. and Indian rights; if the States water officials cannot do this job under a single State or Federal decree it will not be done, and all water users will suffer the results of a lack of lawful and technically competent administration of water rights. It is clear beyond dispute that all claimants must be adjudicated in a single decree; the court in *Akin* quoted with approval the U.S. Senate committee report (on the McCarran amendment) that recognized the "interlocking" of rights to water on a single stream, and that all claimants are necessary parties in a suit of this kind. Recent efforts by the United States to invent a "short-form" of adjudication of Federal and Indian rights by suing a State as "representative" of "its" water users, or omitting joinder of some of the private claimants, have not met with favor in the courts. There is probably no constitutionally permissible method of avoiding the cost and delay of joinder of large numbers of claimants in such a suit; of course, the Indian tribes enjoy the advantage of Federal funds and lawyers to help meet this burden where the tribe or the United States brings the action. In *McCarran* actions, the State or other plaintiff must bear it.

[4] Where no previous or ongoing State court adjudication existed, and the affected Indian tribe felt strongly that Federal court jurisdiction was preferable, and this would not cause undue hardship on other parties, the State of New Mexico has brought stream adjudications in Federal court. New Mexico believes both court systems provide fair and learned treatment of water law problems in such cases; of course, the failure of the Congress to provide adequate manpower and salaries for the Federal judiciary in recent years has tended to make these very large and demanding water right cases especially burdensome to the Federal courts.

those held for Indian tribes, applying Federal law where appropriate. No cogent claim of injury to Indian or other Federal rights has been shown to result; the State courts properly exercising jurisdiction over such rights should now be allowed to demonstrate that they can and will provide equal justice under law to all parties concerned.

Senator ABOUREZK [continuing]. Our final panel of witnesses will be Mel Tonasket, Wendell Chino, Veronic Murdock, and Dan Old Oak.

There is a representative of the Yakima Nation here. Would you be interested in coming up and joining this panel? Mr. Tonasket, are you decided among yourselves who is going to start? I would appreciate it if you would abbreviate your prepared statement. We will print your entire statement in the record, and then we can get at the heart of the issue itself.

Mr. TONASKET. That will be really hard to do, Senator, because the statement all kind of fits in line. It does address some of the issues that have been raised and some of the issues that have not been raised to the attention of the subcommittee. Really it would be difficult for me to abbreviate my statement.

Senator ABOUREZK. Does everybody have a statement they are going to read?

Mr. TONASKET. I believe, so, yes. Some are not too long, though.

Senator ABOUREZK. The problem is that I have got a meeting right now and I am actually only filling in for Senator Kennedy. What we might have to do is come back after lunch and hope Senator Kennedy will be done with his amendment on the floor by then.

Mr. TONASKET. I would respectfully request that that be done because the issue before this committee is probably one of the most crucial before the Indian community.

I believe that all Indian panelists should be given the opportunity to give a full statement.

Senator ABOUREZK. Then why don't we do that? We will take 5 minutes recess now and find out what the schedule is on the floor. Then we will know better what to do.

[Brief recess.]

Senator ABOUREZK. I will recess the hearings until 2 o'clock. It is possible there might be an announced change. I will appreciate it if the witnesses will remain here for just a few minutes.

[Whereupon, at 12 noon the hearing recessed, to reconvene at 9:15 a.m., Wednesday, June 23, 1976.]

OVERSIGHT HEARINGS ON INDIAN WATER RIGHTS

WEDNESDAY, JUNE 23, 1976

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:20 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy, chairman of the subcommittee, presiding.

Present: Senator Kennedy.

Also present: Theresa A. Burt, staff member.

Senator KENNEDY. We will come to order. I regret we were unable to complete our hearings yesterday. We have been very active on the floor trying to propose amendments to make sure that the tax bill is no longer the biggest welfare bill of all, which is the welfare of the rich in this country. We have suffered a few setbacks but we had a not so insignificant victory as well. I am looking forward very much to the panel which will testify this morning. Again, I want to offer my apology and the apology of the committee for being unable to complete the hearings yesterday. I express my appreciation for your willingness to remain with us.

I know you have traveled many miles but you did so because you know the importance of this particular issue, as I do. No record would be even partially complete unless we had the testimony we are going to hear from this panel this morning. We look forward to hearing from Roger Jim, a member of the Yakima tribe, Veronica Murdock of the Colorado River Indian tribes, Mr. Wendell Chino of the Mescalero Apache tribe, and Mel Tonasket of the National Congress of American Indians. We will also hear from Dan Old Elk of the Native American Natural Resource Development Association. Let us proceed with Roger Jim. Mr. Jim.

STATEMENT OF A PANEL COMPOSED OF MR. MEL TONASKET, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS; MR. WENDELL CHINO, PRESIDENT, MESCALERO APACHE TRIBE; MS. VERONICA MURDOCK, VICE CHAIRMAN, COLORADO RIVER INDIAN TRIBES; MR. DAN OLD ELK, CHAIRMAN OF THE NATIVE AMERICAN NATURAL RESOURCE DEVELOPMENT FEDERATION; AND ROGER JIM, THE YAKIMA INDIAN NATION

Mr. JIM. Thank you, Mr. Chairman. My name is Roger Jim. I am a member of the Yakima Tribal Council of the Yakima Indian

Nation. I have here a statement: "The *Akin* decision, a threat to survival of the Western Indian reservations and Indian people". Threats to the treaty rights to the use of water of the Yakima Indian Nation by the Secretary of the Interior first occurred in 1905 when its rights in the Yakima River were taken for the Yakima Federal Reclamation project. The Yakima recovered those rights. In 1908 the Secretary of the Interior attempted to give away 75 percent of the Yakima rights in Ahtanum Creek. Almost a half century later a Federal Court abrogated the attempted giveaway by the Secretary of the Interior. Simply stated, the Yakima Indian Nation has been alert to and has defended against invasions by Federal agencies of its invaluable *Winters* doctrine rights to the use of water. Today the Yakimas, indeed all Indian nations, tribes and people are confronted by an even more serious threat than that presented by secretarial seizure of its rights for non-Indian projects and purposes.

That threat is the consistent and persistent attempts by both the Interior and Justice Departments to lump together the treaty, *Winters* rights to the use of water, and the Federal rights which are exercised by and for non-Indians. By persistently attempting, without right, to present Indian treaty rights and Federal rights as being one and the same, has resulted in the rationale of the recent *Akin* decision of the Supreme Court.

It is declared in that decision that the Indian rights are subject, by the McCarran amendment, to State court jurisdiction, State court control and State administration. That ruling means the end of Western Indian reservations, for State law and jurisdiction are now and have always been hostile to Indian people. At no time have the Western Indians and their reservations been confronted with a more serious threat.

Senator KENNEDY. Let me interrupt you if I could. I missed Mr. Bloom's testimony yesterday, although I had a chance to familiarize myself with it since he testified. Do you think that he portrays accurately the objectivity and even handedness with which the State courts deal with Indians?

Mr. JIM. I have a rebuttal to his statement. There are State judges that will not be anti-Indian regarding adjudication of water rights. However, often all that happens is a loss of a qualified judge. In our State, the State of Washington, and in our county, Yakima County, moderate rulings in Indian fishing cases contributed to the defeat of a State judge. It is not necessarily true that this is the only cause of his defeat. However, it was one of the main causes attributed to his defeat and that has not been lost on other State judges who are now constantly ruling differently from recent Federal District Courts and Court of Appeals decisions in fishing cases. They are continuously enjoining fish regulatory agencies from following Federal court directives. In the West, one's wife, family, and water rights are very important, but not necessarily in that order.

Then we suggest that the State judge's response will be at least as good as in the fishing cases. The judge that was defeated was defeated just 6 months before his pension vested, a double impact not only on that judge but on observing judges as well. Second, it has been suggested that to allow State users to be joined by service on the State is not due process.

How can this same speaker believe that the adjudication of Indian rights should be determined by the joining of the United States when in some instances the interests of the United States and the Indian people may not be equal?

That was a rebuttal to Mr. Bloom's statement of yesterday.

Senator KENNEDY. I would like the others either to comment now or perhaps in the course of their testimony about that particular issue. What is your experience and the tribe's experience on the objectivity of State courts? I think this is a very important issue. I think all of you obviously have very, very direct experience and knowledge in dealing with that. I want to make sure the record includes that item.

Mr. JOE. May I continue?

Senator KENNEDY. Fine. We have just about 50 minutes and I want to be sure that everybody gets a fair chance. These are the points that we want to make for the record: the fairness and objectivity of the courts; how you feel about leaving the administration, and trust responsibility in the hands of the State courts?

This is the heart of the testimony we want to hear this morning. We have a panel here that represents different interests and we want to see if there is a consistency in viewpoint on that.

Mr. JOE. First, it is essential to ascertain how the Indian treaty rights of the Ute Indians could be confused with Forest Service rights administered by the Department of Agriculture. That circumstance is not difficult to understand when it is realized that the Justice Department, which is supposed to represent the Indian people, has consistently used Indian decisions to support non-Indian claims.

Repeatedly in the earlier *Eagle River* decision, the Justice Department represented first to the Colorado Supreme Court and then to the Supreme Court of the United States that the Indian rights and the Federal rights are one and the same. For the Justice Department or for anyone else to misrepresent Indian rights by declaring them as being Federal rights is both legally and historically untrue. In the struggles of the Yakima Nation to preserve its invaluable *Winters* rights, it obtained an unequivocal and clearly stated differentiation between Indian treaty rights and Federal rights. In the first *Ahtanum* decision, the Court of Appeals said this:

> That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in *Winters* vs. *United States* (207 U.S. 564). . . . In the *Winters* case, as here, the reservation was created by treaty; the reserved lands were a part of a much larger tract which the Indians had the right to occupy; and the lands were arid and without irrigation practically valueless. . . . As was said in the *Winters* case, the reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people.
>
> When the Indians agreed to change their nomadic habits and to become a pastoral and civilized people, it must be borne in mind, as the Supreme Court said of this very Yakima treaty, that the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. Before the treaty, the Indians had the right to the use not only

> of Ahtanum creek but of all other streams in a vast area. The Indians did not surrender any part of their right to the use of Ahtanum creek regardless of whether the creek became the boundary or whether it flowed entirely within the reservation.

In no way is it possible to confuse Indian rights with Federal rights in the light of that ruling. It is shocking to observe in the brief filed by the Justice Department that it does not distinguish between treaty rights and Federal rights. In that brief it is noted:

> In contrast to the Western states law of prior appropriation is the Federal reserved rights doctrine originally applied to Indian reservations in *Winters* vs. *United States*, 207 U.S. 564, and held to be equally applicable to non-Indian Federal establishments in *Arizona* vs. *California*, *supra* (373 U.S. at 601). The reserved rights doctrine traces its origin to the right of the United States, as owner of the public lands to the beneficial use of the waters therein.

Manifestly the Justice Department has deliberately attempted to mislead the court and to represent the *Winters* decision as sustaining and pertaining to Federal rights. Had it correctly presented the law and facts and had it distinguished the Indian rights, the catastrophe of the *Akin* decision would probably have been avoided.

Congress alone can protect the Yakima Indian Nation and all other Western Indians by amending the McCarran amendment to exempt Indian *Winters* rights to the use of water from the *Akin* decision.

Thank you very much.

Senator KENNEDY. Thank you very much. Mrs. Murdock.

Mrs. MURDOCK. I think I covered in my testimony the questions that you asked earlier. I know that you also realize the importance of water in the Southwest, so I am not going to go into that. I will hit the highlights of my testimony that I think you are the most interested in.

Throughout American history, Indians have experienced great difficulty in dealing with the various individual states. The experience of the Colorado River Indian tribes is consistent with this statement as the State of Arizona has always been our rival and as we have sought to establish rights to a fair share of the waters of the Colorado River.

The words of Justice Miller written almost a century ago are unfortunately still valid. He stated:

> Because of the local ill feeling, the people of the States where they are found, are often their deadliest enemies. From their very weaknesses and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

The dissenting opinion in *Akin* and the *Colorado River Water Conservation District* cases also clearly recognize the life and death imporance of water rights questions for Indians. Justice Stewart stated:

> This court has long recognized that the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.

There is no doubt that there is a very firm basis for enacting into law that the Federal Courts have exclusive jurisdiction for adjudicating Indian water rights. Tribal and individual Indian water rights are recognized and protected by Federal treaties, statutes and agreements. In *Winters* vs. *United States*, it was held that the right to use of water for the benefit of the Fort Belknap Indian reservation was impliedly reserved in the treaties and agreements creating that reservation. This landmark case still is a significant precedent and guide for the protection of the Indian water rights. Indian water rights have always been adjudicated in the Federal courts and the effect of the recent U.S. Supreme Court decision will be to alter the historical relationship which has developed between the Federal Government and Indian tribes.

The Federal courts are the proper and preferred forum for the resolution of all Indian property rights including water rights. Additionally the complexity of the various Federal questions further require that only the Federal courts should hear Indian water rights questions. The impact of the *Akin* and *Colorado River Water Conservation District* cases is particularly important to the Colorado River Indian tribes. We have decreed water rights in the Colorado River arising out of *Arizona* vs. *California*. This case had not yet been finally settled and negotiations regarding a proposed stipulation will result in a final decree. Our major opponents in these negotiations are the States of California and Arizona. These two States throughout the course of this litigation have been constant and fierce enemies of the Colorado River Indian tribes and other tribes along the Colorado River. The result of the case no doubt would have been greatly different if it were litigated in the courts of either State. In fact if questions arise in the future they very well may be argued in a State court.

I am here to request that this subcommittee duly consider this proposed amendment. Indian water rights are precious for many tribes and the last hope and opportunity for reestablishing the dignity and stature Indians once had. If our water right problems are to be resolved in the State courts, then we foresee long and expensive legal battles in the future. I therefore urge that this subcommittee act favorably on this proposal as soon as possible. Thank you.

Senator KENNEDY. Mr. Chino?

Mr. CHINO. Senator Kennedy, I would like to present two statements: one reflects the position of the National Tribal Chairmen's Association; and the other reflects the position of the Mescalero Apache tribe. In essence I think my testimony for the Mescalero Apache tribe will clearly rebut the position of Mr. Bloom.

Senator Kennedy, may I think you for the opportunity to appear before you and the other distinguished members of your subcommittee on this subject which is so vital to all of the Indian people who continue to reside on Indian reservations. It must always be remembered that the various Indian tribes were once independent and sovereign Nations and that their claim to sovereignty long predates that of the Government of the United States. But it is nonetheless still

true, as it was in the last century, that the relation of an Indian tribe living within the borders of the United States is an anomalous one and of a complex character.

Indian tribes were and always have been regarded as having a semi-independent position when the tribe has preserved their tribal relations, not as states, not as nations, not as full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations and thus far not brought under the laws of the Union or of the State within whose limits they reside. That is the essential language of the *United States* vs. *Kagama* as restated by the U.S. Supreme Court in *McClanahan* vs. the *State Tax Commission of Arizona*.

As a semi-independent Nation the Mescalero Apache tribe is vitally interested in the best interests of its people, and the reasonable development of its reservation.

The correction of the McCarran amendment to require adjudication of Indian water rights in Federal court is an absolute necessity if Indian tribes are to be treated fairly in the courts within the United States. Indian water rights must be adjudicated in Federal court!

It may be too late for the Mescalero Apache tribe to have its water rights determined in Federal court, since it is already involved in litigation, and is at the mercy of the State District Court in New Mexico. Unfortunately the *Mary Akin* case, and the *Lewis* case have been decided respectively by the U.S. Supreme Court, and the Supreme Court of the State of New Mexico, in recent months. Both cases indicated that the water rights of the Mescalero Apache tribe will be decided by an elected State judge.

The problems we face on the Mescalero reservation are:

1. Under article 5 of the New Mexico constitution the Governor of the State of New Mexico is an elected official. The Governor of the State appoints the State engineer, under the provisions of section 75–2–1, and the State engineer has general supervision of all waters of the State and of the measurement, appropriation, distribution thereof, and assumes responsibility for litigating any questions in regard to water.

2. Under article 6 of the New Mexico constitution the judicial power of the State is vested in the Supreme Court, the Court of Appeals, and the District Courts of the State. In each case the constitution requires the election of the judges. In the event of a vacancy, the vacancy is filled by appointment of the Governor.

Senator KENNEDY. What is the matter with the election of the judges?

Mr. CHINO. The obvious impact is tremendous. In New Mexico only 7.2 percent of the people are Indians. The Indian people of New Mexico are generally located on reservations and within any voting district are heavily outweighed by the non-Indian voters, with one or two minor exceptions. So it cannot reasonably be anticipated that a District Court judge could decide such a case without weighing the impact upon his future possibilities for reelection. It is quite apparent that no State District Court judge could erase totally from his mind the impact of his decision upon his reelection. What political fate would befall any judge whose ruling legally took significant Indian water back from the residents of Chaves and Eddy counties? With

this kind of political situation it is a lost cause for Indians to expect State courts to protect Indian water rights. I think that simply is the fact.

We may talk about all the niceties of legal theory which may dictate fairness. There is not a doubt among Indian people in New Mexico that the State courts have favored and will favor non-Indians in its proceedings. The case in which our tribe is now involved has been pending for 20 years. During that time at least five district judges have held different hearings in connection with the case. In addition at least two special masters have held hearings and made recommendations to one or more of the district judges involved. The *Lewis* case has been appealed on at least two different points and then returned to the district court level.

Now, only 4 months after the U.S. Supreme Court unfairly decided the State courts have jurisdiction over Indian water rights, and 20 years after the case was originally filed; the plaintiffs are asking the court for a speedy determination of the limits of the water rights of the Mescalero Apache tribe.

In closing I would like to remind the subcommittee that water is to the land what blood is to the body. If Indians are to stand by and watch their water flow like blood from the reservation because of the opinion of an elected State official, disgust, despair and total decadence can be the only result.

The National Water Commission Act signed by the President on September 26, 1968, created the Commission which continued its work until September 26, 1973. That commission in its exhaustive study and investigations dealt with this specific problem in chapter 14 of the final published report of the Commission. The report states:

> In the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters.

The Commission recommended on page 478 that:

> Jurisdiction of all actions affecting Indian water rights should be in the United States District Court for the district or districts in which lie the Indian reservation and the water body to be adjudicated. Indian tribes may initiate such actions and the United States and affected Indian tribes may be joined as parties in any such action. The jurisdiction of the Federal District Court in such actions should be exclusive, except where article 3 of the Constitution grants jurisdiction to the United States Supreme Court.
>
> In effect, the Federal adjudication would be a supplementary adjudication for determining the amount of water available to the Indian reservation and its place on the list of priorities.

And then concluded that:

> The forum for adjudicating Indian water rights has received the Commission's attention. At one time the Commission proposed to adjudicate Indian water rights in State tribunals according to the State procedures with an appeal to the Federal Circuit Court of Appeals. The Indian tribes objected to the pro-

posal because of controversies stretching back over the years between State officials and Indians over water rights. It seemed preferable, therefore, to place the litigation in the Federal courts, the traditional forum for determining Indian water rights.

Even if the law were changed at this time there is little hope that the Mescalero Apache tribe will have its water rights determined in Federal court. However, the tribe does ask as a matter of fairness that all other Indian tribes be permitted to litigate their water rights in Federal court.

Thank you.

Senator KENNEDY. Mr. Tonasket.

Mr. TONASKET. Thank you, Senator Kennedy. It is my pleasure to be here to represent the National Congress of American Indians. I thank the committee for giving us the opportunity to testify. Congress is being requested to preserve the American Indians of Western United States by amending the so-called McCarran amendment, and to restore to Indian Nations, tribes, and people their immunity from proceedings in state courts to adjudicate their invaluable *Winters* doctrine rights to the use of water. Congress alone can preserve the Western Indians from the single greatest disaster they have experienced since before 1900.

I wish to make a part of this record a copy of my letter dated March 26, 1976, addressed to Senator Abourezk, a member of this subcommittee and Chairman of the Senate Subcommittee on Indian Affairs. Attached to my letter to Senator Abourezk is a simple amendment to the McCarran amendment. I know of no legislation more vital to the American Indians. In Western United States the immunity of Indian *Winters* doctrine rights to the use of water from state law, state courts, state tribunals, state agencies, and state administrators and agents is a matter of survival—a matter of life or death for western Indian reservations, particularly in the arid and semiarid regions.

I do not purport to be able to understand what goes on in the minds of the bureaucracies in the Interior and Justice Department which control the lives and properties of the Indian people. But I can tell you this: Those bureaucracies knew or most assuredly should have known that the course of conduct they followed in the *Akin* case would result in subjugating the invaluable Indian *Winters* doctrine rights to the use of water to state control, state seizure, and ultimately state destruction of Indian reservations in Western United Sates.

It is elemental that the Solicitor of the Department of the Interior is assigned by Congress "to perform the legal work for the Department of the Interior * * *." His primary task is to be the lawyer for the Secretary of the Interior. Equally clear is the fact that the Attorney General of the United States is the lawyer for the Secretary of the Interior before the Supreme Court and the lesser courts. As the lawyer for the Secretary of the Interior both the Solicitor and the Attorney General have disparate and contradictory obligations and responsibilities between the non-Indian agencies of the Interior Department and the American Indian people who are subjected to the control of the Secretary of the Interior.

As previously stated the Justice Department is primarily the lawyer for the Secretary of the Interior and the lawyer for the American Indians only as a subsidiary interest among the many interests of the Secretary. Thus the disparate and contradictory obligations of the Secretary of the Interior with those of the Indians is frequently manifested. The conflicts between the Secretary and the Indians is all-pervasive in many areas. That conflict is manifested most often in regard to the Indians *Winters* right to the use of water and the claims of the Interior on behalf of the Bureau of Reclamation and other non-Indian agencies.

The conflicts between the Secretary of the Interior and the Indians over the use and control of the Indian *Winters* rights is not limited to conflicts among Indians and non-Indians agencies within the Interior Department. Rather it extends to the authority of the Indians to manage and to control their own rights to the use of water on their reservations. The attorneys for the Interior and the Justice Departments are saying that Indian *Winters* rights to the use of water are identical with and cannot be separated from the Federal rights to the use of water.

Thus in the *Eagle River* case, the *Akin* case, and now in the *Walton* case, on my own reservation, the Justice Department is refusing to distinguish between Indian rights held in trust for the Indians and non-Federal rights administered for non-Indian purposes and projects.

The Colville confederated tribes declares in the *Walton* case that their Indian *Winters* rights to the use of water are their own property rights. The Colvilles deny that the Secretary of the Interior has the power to seize their Indian *Winters* rights, to the use of water, to control these rights, to administer those rights, to allocate the waters to which the Colvilles are entitled to in the exercise of those rights. What is happening on the Colville Indian reservation is happening throughout Indian country.

May I respectfully emphasize: Severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-Federal rights and the Indian *Winters* doctrine rights to the use of water.

Senator KENNEDY. Would you say that one more time?

Mr. TONASKET. Severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-Federal rights and the Indian *Winters* rights to the use of water.

On March 24, 1971, 5 years to the day prior to the *Akin* decision, the Supreme Court rendered the *Eagle River* decision. What some call the infamous history of the *Eagle River* decision warrants comment. Briefly here is what happened in that case. The United States owns the White River National Forest in the State of Colorado. A portion of that national forest is within the drainage system of the Eagle River, a tributary of the Colorado River. There was an ongoing water adjudication in water district No. 37.

Pursuant to the State law of Colorado, a supplemental water proceeding was being held in the District Court of Eagle County. As re-

quired by State law, service of notice of that supplemental State court proceeding was made upon the Justice Department in accordance with the McCarran amendment. I am advised—and in legal circles it is well known—that the laws and the decisions of the State of Colorado are strictly predicated upon State's rights, anti-Federal and anti-Indian. From the moment the State of Colorado was admitted into the union up to the present time, that State, under its constitution, has asserted ownership of all the waters within its jurisdiction, has denied the Federal claims.

May I emphasize in the court in which it was most likely to fail, the Justice Department asked to have the McCarran amendment construed against the State. I do not know if a bureaucracy can have a death wish, but the Justice Department seems pointed in that direction, particularly where Indians are involved.

It must be remembered that on repeated occasions the test of the application of the McCarran amendments has been successfully avoided in both the Supreme Court and in the lower courts.

It necessarily follows, therefore, when the Justice Department willingly invoked the jurisdiction of Colorado's Supreme Court to construe that act, the conduct of the Justice Department now and forever must be viewed with suspicion. Having placed itself before the Supreme Court of Colorado, the Justice Department adopted the course of commingling, without differentiation, the Indian and non-Indian decisions. Justice pursued that dangerous course to support what it called the "reserved rights" of the United States. Indian rights, Justice insisted, are Federal rights. It is not surprising that the Colorado Court discussed the Federal and Indian rights as identical in character.

Moreover, before the Supreme Court the Justice Department relied heavily on the predominantly Indian decision of *Arizona* vs. *California* to support the non-Indian Federal claims for the Forest Service. It was not unreasonable, therefore, that the Supreme Court of the State of Colorado, in light of the presentation to it by the Justice Department, did not distinguish between Indian Rights to the use of water and Federal non-Indian rights to the use of the water.

Under the circumstances, the Supreme Court of Colorado did exactly what the Justice Department knew, or should have known, that it would do—it said the United States, by the McCarran amendment, waived its immunity from suit in water litigation declaring,

> We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately.

When the Indian community was informed of the *Eagle* decision and the assured impact it would have upon the Indian *Winters* rights, it began immediate action to force the Justice Department to refrain from mingling Indian *Winters* decisions with non-Indian decisions.

The Fort Mojave Indian tribe and the Agua Caliente tribe, acting through their lawyer, Raymond Simpson, wrote to the then Solicitor General, Mr. Simpson, in his letter dated November 20, 1970, detailed the threat of the Colorado decision to Indians in general and to the Fort Mojave tribe in particular. Emphasis was placed upon the fact

that the Fort Mojave reservation is downstream from the Eagle River and claims rights in it.

The National Congress of American Indians, through Wilkinson, Cragun and Barker, in a letter dated December 22, 1970, joined Ray Simpson emphasizing to the Justice Department the threat to the Western Indians by reason of the *Eagle River* decision.

Louis A. Bruce, then Commissioner of the Bureau of Indian Affairs, and Leon F. Cook, then Acting Director, Economic Development of the Bureau of Indian Affairs, and former president of the National Congress of American Indians, joined the Indian tribes in advising the Department of Justice of the threat of the *Eagle River* decision.

Pursuant to the direction of the Commissioner Bruce and Leon Cook, there was prepared the above-mentioned analysis of the Colorado Court's *Eagle River* decision and the threat to the American Indians. That analysis is entitled, "Conflicts of Interest in Proceedings Before the Supreme Court—A Preface to Disaster for the American Indian People."

It is now history that the Justice Department filed briefs with the Supreme Court which repeated and emphasized the misconception of the Justice Department that *Indian Winters* rights are identical with Federal reserved rights. That was in clear violation of promises made to the tribes that

> The Government intends to make the Supreme Court fully aware of its obligation as trustee of the Indian rights in this matter, and of any bearing that the decision may have on those rights.

In contrast to its commitments to distinguish the Indian *Winters* rights from the non-Indian Federal rights, the Justice Department adhered to precisely the same approach to this nation's highest court. It relied on Indian decisions to support what it referred to as the reserved rights of the United States. Reserved rights have been defined by this court as the entitlement of the United States, not the Indians, to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn. In its summary of argument set forth in its brief to the Supreme Court in *Eagle River*, the Department of Justice said this: "That the United States has reserved water rights based on withdrawals from the public domain is well established. (*Arizona* vs. *California*, 373 U.S. 546, *Winters* vs. *United States*, 207 U.S. 564.)"

Those Indian cases were relied upon to support a claim for strictly Federal Forest Service rights. Moreover, it was not the United States which reserved the rights in *Winters*—it was the Indians who, by their treaty and arguments, reserved the rights—not from the public domain but from their own aboriginal water sources.

Commitments made to the Indian people and violated are nothing new. Seldom however, has such bad faith in the Justice Department respecting Indian people been more carefully documented and proved. The consequences of that bad faith by the Justice Department are clearly apparent in the words of the Supreme Court of the United

States reflecting the failure of the Justice Department to separate the Indian and non-Indian rights in the *Eagle River* case.

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain.

As we said in *Arizona* vs. *California*, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union to reserve waters for the use and benefit of federally reserved lands. The federally reserved lands include any Federal enclave. In *Arizona* vs. *California*, we were primarily concerned with Indian reservations.

Immediately upon the release of the *Eagle River* decision the Fort Mojave tribe in a final struggle to protect Indian people against the consequences of that decision requested an opportunity to be heard. That petition was denied by the Supreme Court.

Whether the Justice Department invited the catastrophe of *Eagle River* which foreshadowed *Akin*, does not matter. What does matter is that we are confronted with easily predictable consequences of the conduct of the Justice Department and the grave necessity for Congress to restore to the Indians their immunity from suit in water litigation.

By their Treaty of 1868, the Ute Indians reserved their *Winters* rights to the use of water—they are not Federal rights. Of great importance is the fact that the Supreme Court and the Court of Appeals of the Ninth Circuit have held that it is the Indians, having treaties, who reserved to themselves their Indian *Winters Doctrine* rights to the use of water. Those courts have declared that the Indian treaties retained those rights for the Indians and that the rights were not derived from the Federal Government. Thus it is that the Ute Indians whose rights were involved in the *Akin* decision, retained for themselves those rights by the treaty of March 2, 1868. Throughout the *Akin* brief, the Department of Justice failed to make that distinction. Rather than making the all-important differentiation, the Justice Department reiterated its errors in *Eagle River* and on page 56 of its *Akin* brief, said this: "As recognized in *Arizona* vs. *California*, supra, 373 U.S. at 601, the principles of reserved rights doctrine are the same whether Indian or non-Indian Federal claims are involved."

It was an imperative necessity then for all Western Indians that the Justice Department specifically declare that the Indians, by their treaties, retained their water rights, that those rights were not granted by the United States to the Indians.

Yet as stated the Justice Department commingled the treaty rights of the Indians with the Forest Service rights and the consequences resulted in the *Akin* decision.

In these terms the *Akin* decision—the Supreme Court in the *Akin* case adopted the Justice Department rationale.

Having referred to the *Eagle River* decision the Court declared that the McCarran amendment subjected Federal reserved rights to State courts and added more specifically the Court held that reserved rights were included in those rights where the United States was otherwise the owner.

Though Eagle County and water division No. 5 did not involve reserved rights on Indian reservations, viewing the Government's

trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed Eagle County spoke of non-Indian rights without any suggestion that there was a distinction between them for purposes of the amendment. As construed in *Akin*, the McCarran amendment subjects Western Indian reservations to state control. It must be amended.

Congress is fully cognizant of the historic and presently ongoing conflicts among the American Indians and the states. It is equally cognizant that to place the Indian *Winters* rights to the use of water under the control and the administration of state laws, jurisdiction, and administration is to place the Indian lives and property under state control. Yet that is precisely the results of the *Akin* decision. It totally subjugates Indian rights to the use of water to the will of the state agencies.

One of the strangest episodes ever seen in the law arises under the *Akin* decision. The states do not and cannot control Indian lands. Yet the *Akin* decision places under state control the Indian *Winters* rights without which the lands are, in the terms of the *Winters* and *Arizona* vs. *California* decisions without value, and are uninhabitable.

The states, by controlling Indian water, will control the Indian reservations and the very lives of the Indians.

An analysis of the *Akin* decision and the brief of the Justice Department in that case, simply fail to recognize the power exercised by the state agencies which control the waters within their jurisdiction.

Ignored completely is the fact that to administer the use of water on an Indian reservation entails an outright state invasion of every Indian reservation in Western United States by state agencies which are now and have always been hostile to Indians, and have sought to denegrate the Indian *Winters* rights.

Again I must refer to the Department of Interior's conflicts of interest. Alliances have always existed between the Bureau of Reclamation and the states. Section 8 of the Reclamation Act provides, in effect, for close cooperation between the reclamation and the States. In the conflicts between the Indians in the San Juan River Basin, the Bureau of Reclamation is solidly alined with the states against the San Juan River Indians.

On the Rio Grande, the Colorado, the Columbia and the Missouri Rivers, the states and the Bureau of Reclamation work most closely. So once again there is repeated the conflict of interest which brought about the *Eagle* and the *Akin* decisions.

THE M'CARRAN ACT AS CONSTRUED IN AKIN IS VIOLATIVE OF THIS NATION'S TRUST RESPONSIBILITY

I am advised that the Congress cannot under the Constitution delegate its trust responsibility owing to the American Indians in regard to their *Winters* rights or otherwise. Yet that is precisely how the Supreme Court has construed the *Akin* case.

If the *Akin* decision is permitted to stand, full power and control over the administration and distribution of the waters to which the Indians are legally entitled would be vested in the office of the state engineer.

It would be that officer—not the Federal officials—who will control the Indian water rights. Under those circumstances, it is respectfully submitted that Congress cannot fulfill its trust obligations. Only by amending the McCarran amendment as it is construed by the Supreme Court can it protect the Indians rights. Only by restoring to the Indians their immunity from state jurisdiction respecting their invaluable *Winters* rights to the use of water can true protection of the Indian reservations be achieved.

On behalf of the National Congress of American Indians and all American Indians, I petition the Congress to act now before it is too late and to stop the threat of Indian destruction by the state invasion of our reservations. The simple amendment to the McCarran amendment which is attached will if it is enacted preserve the Western Indian people from the threat of the *Akin* decision. Thank you.

Senator KENNEDY. Thank you very much.

Mr. Dan Old Elk is our next witness. Mr. Old Elk.

Mr. ELK. Thank you, Senator. My name is Daniel Old Elk. I am the president of the Native American Natural Resource Development Federation (NANRDF) on whose behalf this testimony is submitted. NANRDF is a federation of 24 Indian tribes in the Upper Missouri River Basin who have banded together for the protection of Indian natural resources through prudent planning and development. In carrying out its purposes, NANRDF has undertaken to formulate programs that will describe and quantify the natural resources of the Indian tribes of the northern Great Plains; to develop programs that will produce sufficient scientific data to enable Indian tribes to make informed decisions in the development of their resources and to understand the impact of such development.

Apart from these functions NANRDF provides assistance to Indian tribes in developing management alternatives for their resources and serves as the representative for the Indian interest before Federal and State land, water and natural resource planning organizations in matters that will have direct or indirect effects on Indians and their resources.

In the course of its operations, NANRDF, in connection with its legal and technical consultants, has prepared an initial report (attachment A) which delineates the position of the federation of tribes regarding Indian water rights in the Upper Missouri River Basin.

The 24 tribes have given notice that they claim ownership of, and will vigorously and jealously protect, the priceless natural resources that are geographically and legally related to their reservations. They have declared, and the courts have sustained, that the northern Great Plains Indian tribes have the prior and paramount rights to the waters of all rivers, streams, or other bodies of water, including tributaries, which flow through, arise upon, underlie or border their reservations.

The northern Great Plains tribes further assert that their prior and paramount rights extend to all waters that may now or in the future be artificially augmented or created by weather modification, by desalinization of presently unusable water supplies, by production of water supplies as a byproduct of geothermal power development or by any other scientific or other type of means within the respective reservations in the northern Great Plains area.

In view of the Indians' prior and paramount right to the use of all waters to which they are geographically related, it is indisputable that any major diversion of such waters, be it a Federal, State or private use, would constitute an encroachment upon Indian water rights.

The northern Great Plains tribes, like all other tribes, need their water resources in order to establish and maintain viable and productive economies on reservation lands. Thus, gone are the days in which Indian tribes will stand idly by and acquiesce in the dissipation of valuable natural resources. The tribes now stand ready and are prepared to fight, both legislatively and judicially, against measures that will result in the further erosion of their invaluable water rights.

The Upper Missouri River Basin, in which the 24 federation tribes are located, serves as a useful focal point in drawing out the need for affirmative efforts to protect Indian water rights.

It is predicted that coal production in the Upper Missouri River Basin will increase from less than 20 million tons in 1972 to nearly 90 million tons by 1980. Although coal mined in this region is being shipped to eastern and midwest markets, future plans call for large increases in mine-mouth generation of power as well as coal liquification and gasification.

Oil shale development, iron ore extraction, steel production, uranium mining and nuclear powerplants are also part of the picture. These projects represent a major industrial reorganization of the United States based on western resources.

The large increases in new material production will depend upon their rate of conversion into electricity, fuel and fabricated metal. In turn, their conversion rate will ultimately depend upon the availability of water. Water is basic to every natural and manmade raw material energy conversion process.

Tens upon thousands of acre-feet of water will be required to accommodate the facilities constructed to mine and process the mineral resources alone. The water for such massive projects will have to come from existing sources of water supply and will ultimately come into conflict with existing water rights, including those of the northern Great Plains Indian tribes. [*See*, "Water for Industry in the Upper Missouri River Basin," attachment 2.]

Although there are extensive plans for the utilization of the water resources in the Upper Missouri River Basin, there is still time to protect the prior and paramount Indian water rights. At the present time, there exists sufficient water to meet all current water requirements.

However, as the extensive plans for energy development are implemented, a water shortage will result similar to the one present in the Colorado River Basin. Accordingly, protection of Indian water rights can only be accomplished by a program to inventory, and quantify the present and future uses that the tribes have for the utilization of their water.

Such protection necessarily includes a proper and experienced forum in which the Indian water rights may be asserted and determined. To this end the Federation has worked hand-in-hand with the Crow and Northern Cheyenne tribes, the Bureau of Indian Affairs,

the Solicitor's Office of the Department of the Interior and the Justice Department in developing a plan to protect and preserve the Indian water rights in the upper tributaries of the Missouri River in the State of Montana.

The United States together with the Crow and the Northern Cheyenne tribes have filed suit to have their rights determined in the waters of the Big Horn and Tongue Rivers and Rosebud Creek in Federal District Court in Montana. However, it is now asserted that the Supreme Court decision in *United States* v. *Akin, Colorado River Conservation District, et al* v. *United States*, —— U.S. ——, 44 U.S.L.W. 437 (decided March 24, 1976), makes the prosecution of these actions in Federal court improper.

It is the position of the Northern Great Plains tribes that *Akin* does not preclude the adjudication of Indian water rights in Federal court. In fact, the Montana State courts are precluded from adjudicating these controversies because of limitations placed in its enabling legislation and constitution.

The McCarran amendment does not waive, repeal or consent to the amendment of the provisions in the state enabling acts and constitutions of the Northern Great Plains states disclaiming jurisdiction over Indian lands. These acts and/or constitutions contain provisions disclaiming jurisdiction over Indian lands within their boundaries. A typical example is Montana's Enabling Act which states:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to . . . All lands lying within said limits owned or held by any Indian or Indian tribes; and that *until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.* [Montana Enabling Act, 25 Stat. 676, 677 (emphasis added).]

This same language appears in Montana's Constitution (art. 12, sec. 2) and in the enabling acts and Constitution of North Dakota (25 Stat. 676, 677 and art. 26, sec. 203) and South Dakota (25 Stat. 676, 677 and art. 22, sec. 2).

The Nebraska Organic Act, the Wyoming Enabling Act and the Wyoming State Constitution contain similar provisions.

[*See*, Organic Act of Nebraska (10 Stat. 277), and Organic Act of Wyoming, (15 Stat. 178); and art. 21, sec. 26, of the Wyoming Constitution.]

The disclaimer clause in the Colorado Enabling Act (18 Stat. 474), is different. It provides: "The Constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed . . ."

Public Law 280, in addition to conferring certain limited civil and criminal jurisdiction over Indians and Indian country on several enumerated states, provided a vehicle for other states to obtain jurisdiction.

Section 6 of Public Law 83–280, 67 Stat. 588, 590 waives or repeals the disclaimer provisions in state enabling acts and gives the consent of the United States for the people of the states to amend their con-

stitutions or statutes containing "legal impediments" to the assumption of jurisdiction.

Senator KENNEDY. We are going to put the full statement in the record.

I am going to have to excuse myself in just a few minutes. I would like to ask you a couple of questions, if I could. One is what the Crow tribe is doing about the quantification and the use of water near the reservation.

Mr. ELK. The Crow tribe is making studies to have a complete comprehensive plan for the use of water so we can plan a reservoir inventory, uses for industrial waters, additional irrigation projects, and largely domestic uses.

Senator KENNEDY. You have indicated I think that the State of Montana actually enacted legislation which may interfere with Federal protection of the Indian natural resources. Is that so, the Montana Development Natural Resources Law?

Mr. ELK. Yes. This is the disclaimer of these states which is different from the State of Colorado.

Senator KENNEDY. But does that help provide further protections or do you think it is a threat to the development of resources?

Mr. ELK. Well——

Senator KENNEDY. The Montana Development Natural Resources law. Do you think that is going to help protect your resources or do you think it may very well threaten your rights or does it really make very much difference?

Mr. ELK. It threatens our rights.

Senator KENNEDY. As I understand it even though the Yellowtail is located on the Crow reservation, that you don't get any of the water there for development programs on the reservation. Is that right?

Mr. ELK. That is true.

Senator KENNEDY. Is there anything that can be done to change this?

Mr. ELK. We have talked with the Bureau of Reclamation and we have addressed correspondence to the Secretary of the Interior.

Senator KENNEDY. But you are working on that?

Mr. ELK. Yes. We are working on it now.

Senator KENNEDY. You are hopeful to be able to work out some kind of agreement where you can get some of that water?

Mr. ELK. Yes.

Senator KENNEDY. That should be very helpful. Can you tell us something about your reaction to the BIA's efforts to protect the Crow water rights? Have you been satisfied with that to date?

Mr. ELK. Yes. They have been able to help us with the inventoring and planning of our proposed water development projects.

Senator KENNEDY. You are getting cooperation?

Mr. ELK. Yes, we are.

Senator KENNEDY. That is helpful, too. What about these new offices in the Justice and Interior Departments? Are they beginning to respond more positively to some of your interests, Indian water rights for the BIA's Indian Water Rights Office?

Mr. ELK. Yes. We have worked with them and they have been very helpful.

Senator KENNEDY. What about in the Department of Justice?

Mr. ELK. That is what I mean.

Senator KENNEDY. How about the rest of the panel?

Mr. TONASKET. I am aware of a number of instances where the Department of Justice attorneys in that special section. In one case, the *Blackbird Bend* case, where the Omahas from Nebraska begged for the Justice Department not to file a suit since they were not prepared at that time. The Justice Department went ahead anyway in opposition to the Omaha tribe. I know that the major problem when we get into Indian water rights is that the Justice Department always takes the position that the United States owns the water and the Secretary of Interior has the right to control.

That is completely the opposite of the position of the tribes, particularly in the Northwest. I will speak for my tribe, the Colville tribe, in the *Walton* case. They are going one way and we are taking the other. That is the real conflict.

I could go on about that but I would rather give the others a chance.

Senator KENNEDY. Mr. Chino?

Mr. CHINO. I concur with Mr. Tonasket. I think that most Indian tribes are ill-prepared to litigate their water rights. Our adversaries, who desire to move against the Indian tribes are generally fully prepared and ready to proceed, and in most cases, supported by the states. Perhaps that is an essential part of the strategy, to move in on tribes at a time when the tribes are not yet properly prepared.

I think what the Indian people need is what Dan was talking about, a great deal of research and preparation to properly defend the water rights of Indian people.

Ms. MURDOCK. Yes. This is true. We are working with the *Arizona* v. *California* decision. We had a great deal of trouble even getting information. I would hope that these matters would change.

I know that a representative did come out and meet with the tribes and did talk with us about changes. It seemed good but we are waiting to see what the outcome is. There was a lot of information that the tribes don't receive that goes on within both of these departments.

Mr. JIM. I feel that once an attorney is assigned to protect the Indian rights such as a water specialist that we have here, it seems like they always find some way to try to circumvent him, prevent him from fully protecting the rights of the Indians. I would like to see once he is given the opportunity to work with the Indian tribes and protect them, and their rights that there will be no curtailment of him.

Senator KENNEDY. You think if Mr. Veder were making those decisions, there would not be a problem?

Mr. JIM. Right.

Mr. CHINO. Some very serious constitutional questions have been raised by the *Akin* case. I think that these constitutional questions are worth being explored and researched in view of the historical Federal and Indian relationship.

Senator KENNEDY. OK. I want to thank all of you very much for your helpful comments and statements. We thank you very much for presenting your case this morning, and for your comments in response to these questions. We are strongly committed to ensuring that there is the protection of both water and mineral rights. We want to assure that the appropriate forums are available to the Indian tribes so they can get a fair and just resolution of these questions, and we are extremely mindful of the important Federal guaranties for these

protections. We want to insist that those Federal guaranties are not lost through decisions that may provide some degree of ambiguity as to the appropriate forum for the protection of these rights.

The Federal responsibilities I think are clear. It is unequivocal and it is a commitment that I want to see fulfilled.

Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 10:30 a.m., the subcommittee adjourned subject to call of the Chair.]

[The prepared statements of Mel Tonasket, Wendell Chino, and Dan Old Elk follow:]

PREPARED STATEMENT OF WENDELL CHINO, PRESIDENT, NATIONAL TRIBAL CHAIRMAN'S ASSOCIATION (NTCA), AND PRESIDENT, MESCALERO APACHE TRIBE

Mr. Chairman and members of the subcommittee, I am Wendell Chino, President of the National Tribal Chairman's Association. I appreciate this opportunity to state NTCA's position regarding the effect of the McCarran amendment on Indian water rights in light of recent Supreme Court treatment of the issue.

The basic policy behind the McCarran amendment is reasonable—the United States waives sovereign immunity to suits in which coherent adjudication of the rights of all water users is necessary. Indian tribes need not concern themselves with the Federal Government's choice of where it wishes to litigate its own water rights. Perhaps even the aim of the Supreme Court in its decision in *Colorado River Conservation District* v. *United States*, 96 S. Ct. 1236 (1976),—more commonly called the *Akin* case—is rational from the judicial point of view in that it preserves judicial economy by permitting the exercise of exclusive jurisdiction over water adjudication in state courts. Neither purpose intends the sacrifice of long-established and absolutely vital Indian water rights. Together the McCarran amendment and the *Akin* decision forecast that destruction.

NTCA believes we should never have reached the point where Indian rights can be adjudicated fully in state courts, but having come this far, remedial legislation is necessary. Indian water rights are private in nature, distinct from Federal reserved and other water rights. More importantly, the trust responsibility of the United States toward Indian tribes and their property, we submit, requires that Indian-owned water rights, to the extent they must be adjudicated, be defended in Federal courts which have traditionally been regarded as the fairest arbiters of Indian rights, especially where there exists conflict with state and non-Indian private rights.

The distinction between Federal reserved water rights and Indian water rights—all but destroyed in the *Akin* decision—must be revived. Federal reserved waters are public in nature, derived from the control and ownership of the United States. Indian rights, however, are private, dating from cession by quasi-sovereign Indian nations to the United States of resources under Indian possession and ownership, and are now held in trust by the United States for the tribe. Our rights to adequate water resources derive directly from the Constitution and have been recognized in their present form since *Winters* v. *United States* in 1963.

Indian rights to water are distinct from state rights because they are reserved, that is, the tribes have retained title to all water they have not in fact ceded to other authorities, and the Supreme Court has held as a matter of law that the tribes have reserved water sufficient to fulfill the purposes for which the reservations were created. This includes the development and maintenance of the reservation as a tribal homeland for the indefinite future. It means the availability of water to meet future needs.

State legal systems have little or no experience with the concept of reserved rights. In fact most state law is hostile to the principle relying instead on doctrines of prior appropriation to actual beneficial uses. We have stated before, as *amicus curiae* in appellate proceedings, that state courts are not the appropriate forums for determining the purposes of Indian reservations and assuring their fulfillment and, thus, the destiny of the tribe itself, through the judicial allocation of sufficient water resources.

As recently as 1966 the Senate, in reporting legislation providing for original jurisdiction in the district courts of all civil actions raising Federal questions and brought by Indian tribes (28 U.S.C. section 1362 (1970)), found that:

> There is great hesitancy on the part of tribes to use state courts. This reluctance is founded partially on traditional fear that tribes have had of the

states in which their reservations are situated. Additionally, Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of federal law that has developed over the years. . . .

S. Rep. No. 1507, 89th Cong., 2d Sess. (1966).

Unfortunately, the "traditional fears" of state courts recognized by Congress in statute have not been unjustified, nor have the bases for such fears disappeared in recent years. The will and propensity of the States to assert their otherwise legitimate authority over all persons and property within their borders continues as anathema to the Federal constitutional status of Indians as a quasi-sovereign people, separate and politically distinct from other citizens in their tribal right of self-governance. The states generally seek where they can the erosion of tribal rights and authority, and we have no reason to believe their quest will cease in this most crucial area of water rights.

If Congress did not intend that substantive Indian water rights be merged with all other Federal rights and left to potential deterioration in state courts, and there is much to suggest that it did not, then Congress must act to rectify the situation. If Congress did so intend, then we submit that the United States also intends an abdication of the fiduciary responsibilities it has assumed under the Constitution and through its treaties and statutes.

There is no mention of Indian water rights in the McCarran amendment. From this, the Supreme Court has found itself free to interpret the amendment to surrender Indian rights to exclusive Federal determination. But the states have no jurisdiction over any Indian right without express grant by Congress, a principle well-established by precedent of the Court. The McCarran amendment should not be utilized to provide such an unintentional grant of power.

The failure of the amendment to deal expressly with the issue of Indian water rights in the past has led to the *Akin* holding and a serious threat of destruction of those rights. Congress must remedy this situation by providing for exclusive adjudication of Indian water rights in Federal courts. This subcommittee must propose legislation clarifying the McCarran amendment to foreclose the prevailing jurisdictional situation.

Exclusive Federal jurisdiction over Indian water issues will not deprive the states of authority to adjudicate state water issues, but will preserve the opportunity for full and fair adjudication of Indian and Federal issues. Such jurisdiction is supportable by reason of the prevalence of Federal law in any such litigation, and the exclusive concern of Federal law for Indians as tribal people. Such exclusive jurisdiction in Federal courts has been supported by a number of legislative proposals presented to Congress and has been advocated by the National Water Commission.

While a majority of the Supreme Court perceived in its *Akin* decision no diminution of substantive Indian water rights and no abdication of Federal responsibility, Justices Stewart, Blackmun, and Stevens stated forthrightly in dissent that "a Federal court is a more appropriate forum than a state court for determination of questions of life-and-death importance to Indians. . . . This Court has long recognized that '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " We can view the matter in no other way. Access to a proper forum is a substantive right for which we now must fight before Congress and in the courts.

We trust that the issue will be clear to this committee and that Congress will act swiftly to restore the jurisdictional balance which has been so severely disrupted in recent months.

Prepared Statement of Mel Tonasket, President of the National Congress of American Indians

The Akin Decision:[1] A Foreseen Disaster for American Indians

I am Mel Tonasket and I am president of the National Congress of American Indians. I wish to thank this subcommittee for holding this very important hearing and for permitting me to appear before it.

Congress is being requested to preserve the American Indians of Western United States by amending the so-called McCarran act and to restore to Indian

[1] Decided by the Supreme Court of the United States March 24, 1976, *Colorado River Water Conservation District et al* vs. *United States; Mary Akin, et al* vs. *United States*, 74-940 and 74-949, October term 1975.

Nations, tribes, and people their immunity from proceedings in state courts to adjudicate their invaluable Winters doctrine rights to the use of water.[2] Congress alone can preserve the Western Indians from the single greatest disaster they have experienced since before 1909.

I wish to make a part of this record a copy of my letter dated March 26, 1976, addressed to Senator Abourezk, a member of this subcommittee and Chairman of the Senate Subcommittee on Indian Affairs. Attached to my letter to Senator Abourezk is a simple amendment to the McCarran act (43 U.S.C. 666). I know of no legislation more vital to the American Indians. In Western United States, the immunity of Indian *Winters* doctrine rights to the use of water from state law, state courts, state tribunals, state agencies, and state administrators and agents is a matter of survival—a matter of life or death for Western Indian Reservations, particularly in the arid and semiarid regions.

I do not purport to be able to understand what goes on in the minds of the bureaucracies in the Interior and Justice Departments which control the lives and properties of Indian people. But I can tell you this: those bureaucracies knew or most assuredly should have known that the course of conduct they followed in the *Akin* cases would result in subjugating the invaluable Indian *Winters* doctrine rights to the use of water to state control, state seizure, and ultimately state destruction of Indian reservations in Western United States.

THE AKIN DISASTER: A PRODUCT OF CONFLICTS OF INTEREST IN THE JUSTICE AND INTERIOR DEPARTMENTS

It is elemental that the Solicitor of the Department of the Interior is assigned by Congress to perform "the legal work for the Department of the Interior. . . ." His primary task is to be the lawyer for the Secretary of the Interior. Equally clear is the fact that the Attorney General of the United States is the lawyer for the Secretary of the Interior before the Supreme Court and the lesser courts. As the lawyer for the Secretary of the Interior, both the Solicitor and the Attorney General have disparate and contradictory obligations and responsibilities between the non-Indian agencies of the Interior Department and the American Indian people who are subjected to the control of the Secretary of the Interior.

As previously stated, the Justice Department is primarily the lawyer for the Secretary of the Interior and the lawyer for the American Indians only as a subsidiary interest among the many interests of the Secretary. Thus, the "disparate and contradictory" obligations of the Secretary of the Interior with those of the Indians is frequently manifested. The conflicts between the Secretary and the Indians is all-pervasive in many areas. That conflict is manifested most often in regard to the Indians' *Winters* rights to the use of water and the claims to the Interior on behalf of the Bureau of Reclamation and other non-Indian agencies.

The conflicts between the Secretary of the Interior and the Indians over the use and control of the Indian *Winters* rights is not limited to conflicts among Indians and non-Indian agencies within the Interior Department. Rather, it extends to the authority of the Indians to manage and to control their own rights to the use of water on their reservations. The attorneys for the Interior and Justice Departments are saying that Indian *Winters* rights to the use of water are identical with and cannot be separated from the Federal right to the use of water. Thus, in the *Eagle River* case, the *Akin* case, and now in the *Walton* case, on my own reservation, the Justice Department is refusing to distinguish between Indian rights held in trust for the Indians and non-Federal rights administered for non-Indian purposes and projects.

The Colville Confederated Tribes declare in the *Walton* cases that their Indian *Winters* rights to the use of water are their own property rights. The Colvilles deny that the Secretary of the Interior has the power to seize their Indian *Winters* rights to the use of water, to control those rights, to administer those rights, or to allocate the waters to which the Colvilles are entitled to in the exercise of those rights. What is happening on the Colville Indian reservation is happening throughout Indian country.

May I respectfully emphasize: severe losses are now and have been experienced due to the refusal of the Department of Justice and the Department of the Interior to distinguish administratively and before the courts the non-Federal rights and the Indian *Winters* doctrine rights to the use of water.

[2] The Indian Winters doctrine rights to the use of water entitles the Indians to sufficient water from water resources on their reservations to meet their present and future water requirements. (*Winters* vs. *United States*, 207 U.S. 564 (1908).)

THE EAGLE RIVER DECISION: A PREFACE TO DISASTER FOR THE AMERICAN INDIAN PEOPLE [3]

On March 24, 1971, 5 years to the day prior to the *Akin* decision, the Supreme Court rendered the *Eagle River* decision. What some call the infamous history of the *Eagle River* decision warrants comment. Briefly, here is what happend in that case. The United States owns the White River National Forest in the State of Colorado. A portion of that national forest is within the drainage system of the Eagle River, a tributary of the Colorado River. There was an ongoing State wager adjudication in Water District No. 37. Pursuant to the state law of Colorado, a "supplemental" water proceeding was being held in the District Court of Eagle County. As required by state law, service of notice of that supplemental state court proceeding was made upon the Justice Department in accordance with the McCarran Act.

I am advised—and in legal circles it is well known—that the laws and the decisions of the State of Colorado are strictly predicated upon state's rights—anti-Federal and anti-Indian. From the moment the State of Colorado was admitted into the Union up to the present time, that State, under its Constitution, has asserted ownership of all the waters within its jurisdiction; has denied the Federal claims. May I emphasize: In the court in which it was most likely to fail, the Justice Department asked to have the McCarran act construed against the State. I do not know if a bureaucracy can have a death wish, but the Justice Department seems pointed in that direction, particularly when Indians are involved. It must be remembered that on repeated occasions the test of the application of the McCarran act had been successfully avoided in both the Supreme Court and in the lower courts. It necessarily follows, therefore, when the Justice Department willingly invoked the jurisdiction of Colorado's Supreme Court to construe that act, the conduct of the Justice Department now and forever must be viewed with suspicion.

Having placed itself before the Supreme Court of Colorado, the Justice Department adopted the course of commingling, without differentiation, the Indian and non-Indian decisions. Justice pursued that dangerous course to support what it called "the reserved rights" of the United States. Indian rights, Justice insisted, are "Federal rights." It is not surprising that the Colorado Court discussed the Federal and Indian rights as identical in character.

Moreover, before the Supreme Court, the Justice Department relied heavily on the predominantly Indian decision of *Arizona* vs. *California* to support the non-Indian Federal claims for the Forest Service. It was not unreasonable, therefore, that the Supreme Court of the State of Colorado, in light of the presentation to it by the Justice Department, did not distinguish between Indian *Winters* rights to the use of water and Federal non-Indian rights to the use of water.

Under the circumstances, the Supreme Court of Colorado did exactly what the Justice Department knew, or should have known, that it would do—it said the United States, by the McCarran act, waived its immunity from suit in water litigation, declaring: "We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum, and perhaps more adequately".[4]

When the Indian community was informed of the *Eagle* decision and the assured impact it would have upon the Indian *Winters* rights, it began immediate action to force the Justice Department to refrain from mingling Indian *Winters* decisions with non-Indian decisions. The Fort Mojave Indian tribe and the Agua Caliente tribe, acting through their lawyer Raymond Simpson, wrote to the then Solicitor General, Mr. Simpson, in his letter dated November 20, 1970, detailed the threat of the Colorado decision to Indians in general and to the Fort Mojave tribe in particular. Emphasis was placed upon the fact that the Fort Mojave reservation is downstream from the Eagle River and claims rights in it.

The National Congress of American Indians, through Wilkinson, Cragun and Barker, by a letter dated December 22, 1970, joined Ray Simpson in emphasizing to the Justice Department the threat to the Western Indians by reason of the *Eagle River* decision. Louis A. Bruce, then Commissioner of the Bureau of Indian Affairs, and Leon F. Cook, then Acting Director, Economic Development of the Bureau of Indian Affairs and former president of the National Congress of Ameri-

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[3] "Conflicts of interest in proceedings before the Supreme Court of the United States: a preface to disaster for the American Indian people," by William H. Veeder.

[4] *United States of America, Petitioner* vs. *the District Court in and for the County of Eagle*, 164 Colo. 555; 458 P. (2), 760, 773 (1969).

can Indians, joined the Indian Tribes in advising the Department of Justice of the threat of the *Eagle River* decision. Pursuant to the direction of Commissioner Burce and Leon Cook, there was prepared the above-mentioned analysis of the Colorado Court's *Eagle River* decision and the threat to the American Indians. That analysis is entitled: "Conflicts of interest in proceedings before the Supreme Court: A preface to disaster for the American Indian people."

It is now history that the Justice Department filed briefs with the Supreme Court which repeated and emphasized the misconception of the Justice Department that Indian *Winte s* rights are identical with Federal reserved rights. That was in clear violation of promises made to the Tribes that "* * * the Government intends to make the Supreme Court fully aware of its obligation as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights." [5]

In contrast to its commitments to distinguish the Indian Winters rights from the non-Indian Federal rights, the Justice Department adhered to precisely the same approach to this Nation's highest Court—it relied on Indian decisions to support what it referred to as the "reserved" rights of the United States: "Reserved rights have been defined by this Court as the entitlement of the United States [not the Indians] to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn * * * *Arizona* vs. *California* * * *." [6] In its summary of argument set forth in its brief to the Supreme Court in *Eagle River*, the Department of Justice said this: "That the United States had reserved water rights based on withdrawals from the public domain is well established. *Arizona* vs. *California*, 373 U.S. 546, *Winters* vs. *United States* 207 U.S. 564." Those Indian cases were relied upon to support a claim for strictly Federal Forest Service rights. Moreover, it was *not* the United States which reserved the rights in *Winters*—it was the Indians who, by their treaty and agreements, reserved the rights—not from the public domain but from their own aboriginal water sources.

Commitments made to the Indian people and violated are nothing new. Seldom, however, has such bad faith in the Justice Department respecting Indian people been more carefully documented and proved. The consequences of that bad faith by the Justice Department are clearly apparent in the words of the Supreme Court of the United States reflecting the failure of the Justice Department to separate the Indian and non-Indian rights in the *Eagle River* case: "It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona* v. *California*, 373 U.S. 546, the Federal Government had the authority both before and after a state is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' (Id., at p. 597.) The federally reserved lands include any Federal enclave. In *Arizona* v. *California* we were primarily concerned with Indian reservations. (Id., at 598–691.)" [7]

Immediately upon the release of the *Eagle River* decision, the Fort Mojave tribe, in a final struggle to protect Indian people against the consequences of that decision, requested an opportunity to be heard. That petition was denied by the Supreme Court.[8]

Whether the Justice Department invited the catastrophe of *Eagle River* which foreshadowed Akin, does not matter. What does matter is that we are confronted with easily predictable consequences of the conduct of the Justice Department and the grave necessity for Congress to restore to the Indians their immunity from suit in water litigation.

Of great importance is the fact that the Supreme Court and the Court of Appeals of the Ninth Circuit have held that: It is the Indians, having Treaties, who reserved to themselves their Indian *Winters* doctrine rights to the use of water. Those courts have declared that the Indian treaties retained those rights for the Indians and that the rights were not derived from the Federal Government. Thus, it is that the Ute Indians, whose rights were involved in the *Akin* decision, retained for themselves those rights by the treaty of March 2, 1868.[9]

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[5] Letter dated November 6, 1970 to the chairman of the Fort Mojave tribe from the Solicitor General.

[6] Petition of the United States for a writ of certiorari to the Supreme Court of Colorado, *Eagle River* decision.

[7] *United States* vs. *District Court for Eagle County*, 401 U.S. 520, 522, 523 (1971).

[8] *United States* vs. *District Court for Eagle County*, 402 U.S. 940. (1971).

[9] See *Winters* vs. *United States*, 207 U.S. 564 (1908); *United States* vs. *Ahtanum Irrigation District*, 236 Fed. (2) 321, 326; CA 9 (1958).

Throughout the *Akin* brief, the Department of Justice failed to make that distinction. Rather than making that all-important differentiation, the Justice Department reiterated its errors in *Eagle River* and, on page 55 of its *Akin* brief, said this: "As recognized in *Arizona* v. *California*, supra, 373 U.S. at 601, the principles of reserved rights doctrine are the same whether Indian or non-Indian Federal claims are involved."

It was an imperative necessity for all Western Indians that the Justice Department specifically declare that the Indians, by their treaties, retained their water rights—that those rights were not granted by the United States to the Indians. Yet, as stated, the Justice Department comingled the treaty rights of the Indians with the Forest Service rights and the consequences resulted in the *Akin* decision.

In these terms, the Supreme Court in the *Akin* case adopted the Justice Department rationale. Having referred to the *Eagle River* decision, the Court declared that the McCarran act subjected "Federal reserved rights" to state courts and added: "More specifically, the Court held that reserved rights were included in those rights where the United States was 'otherwise' the owner. *United States* vs. *District Court for Eagle County*, supra, at p. 524. Though *Eagle County and Water Division No. 5* did not involve reserved rights on Indian reservations, viewing the Government's trusteeship of Indian rights as ownership, the logic of those cases clearly extends to such rights. Indeed, *Eagle County* spoke of non-Indian rights and Indian rights without any suggestion that there was a distinction between them for purposes of the amendment. Id. at p. 523." [10]

AS CONSTRUED IN AKIN, THE MCCARRAN ACT SUBJECTS WESTERN INDIAN RESERVATIONS TO STATE CONTROL

Congress is fully cognizant of the historic and presently ongoing conflicts among the American Indians and the states. It is equally cognizant that to place the Indian *Winters* rights to the use of water under the control and the administration of state laws, jurisdiction, and administration is to place the Indian lives and property under state control. Yet, that is precisely the result of the *Akin* decision. It totally subjugates Indian rights to the use of water to the will of the state agencies. One of the strangest episodes ever seen in the law arises under the *Akin* decision. The states do not and cannot control Indian lands. Yet the *Akin* decision places under state control the Indian *Winters* rights without which the lands are, in the terms of the *Winters* and *Arizona* vs. *California* decisions, without value; are uninhabitable. The states, by controlling Indian water, will control the Indian reservations and the very lives of the Indians.

An analysis of the *Akin* decision and the brief of the Justice Department in that case, simply fail to recognize the power exercised by the state agencies which control the waters within their jurisdiction. Ignored completely is the fact that to administer the use of water on an Indian reservation entails an outright state invasion of every Indian reservation in Western United States by state agencies which are now and have always been hostile to Indians and have sought to denegrate the Indian *Winters* rights.

Again, I must refer to the Department of Interior's conflicts of interest. Alliances have always existed between the Bureau of Reclamation and the states. Section 8 of the Reclamation Act provides, in effect, for close cooperation between the Reclamation and the states. In the conflicts between the Indians in the San Juan River basin, the Bureau of Reclamation is solidly aligned with the state against the San Juan River Indians.

On the Rio Grande, the Colorado, the Columbia, and the Missouri Rivers, the states and the Bureau of Reclamation work most closely. So, once again, there is repeated the conflict of interest which brought about the *Eagle* and *Akin* decisions.

THE MC CARRAN ACT AS CONSTRUED IN AKIN IS VIOLATIVE OF THIS NATION'S TRUST RESPONSIBILITY

I am advised that the Congress cannot, under the Constitution, delegate its trust responsibility owing to the American Indians in regard to their *Winters* rights or otherwise. Yet, that is precisely how the Supreme Court has construed the *Akin* case.

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[10] *Colorado River Water Conservation District, et al* vs. *United States,* slip opinion pages 8 and 9.

If the *Akin* decision is permitted to stand, full power and control over the administration and distribution of the waters to which the Indians are legally entitled would be vested in the office of the state engineer. It would be that officer—not the Federal officials—who will control the Indian water rights. Under those circumstances, it is respectfully submitted that Congress cannot fulfill its trust obligation. Only by amending the McCarran Act (as it is construed by the Supreme Court) can it protect the Indians' rights. Only by restoring to the Indians their immunity from state jurisdiction respecting their invaluable *Winters* rights to the use of water can true protection of the Indian Reservations be achieved.

On behalf of the National Congress of American Indians and all American Indians, I petition the Congress to act now before it is too late and to stop the threat of Indian destruction by the state invasion of our reservations. The simple amendment to the McCarran Act which is attached will, if it is enacted, preserve the Western Indian People from the threat of the *Akin* decision.

PREPARED STATEMENT OF DANIEL OLD ELK

My name is Daniel Old Elk, and I am the president of the Native American National Resource Development Federation (NANRDF) on whose behalf this testimony is submitted. NANRDF is a federation of 24 Indian tribes in the Upper Missouri River basin who have banded together for the protection of Indian natural resources through prudent planning and development.

In carrying out its purposes, NANRDF has undertaken to formulate programs that will describe and quantify the natural resources of the Indian tribes of the northern Great Plains; to develop programs that will produce sufficient scientific data to enable Indian tribes to make informed decisions in the development of their resources and to understand the impact of such development. Apart from these functions, NANRDF provides assistance to Indian tribes in developing management alternatives for their resources and serves as the representative for the Indian interest before Federal and State land, water and natural resource planning organizations in matters that will have direct or indirect effects on Indians and their resources.

In the course of its operations, NANRDF, in connection with its legal and technical consultants, has prepared an initial report [attachment 1] which delineates the position of the federation of tribes regarding Indian water rights in the Upper Missouri River basin. The 24 tribes have given notice that they claim ownership of, and will vigorously and jealously protect, the priceless natural resources that are geographically and legally related to their reservations. They have declared, and the courts have sustained, that the northern Great Plains Indian tribes have the prior and paramount rights to the waters of all rivers, streams, or other bodies of water, including tributaries, which flow through, arise upon, underlie or border their reservations. The northern Great Plains tribes further assert that their prior and paramount rights extend to all waters that may now or in the future be artificially augmented or created by weather modification, by desalinization of presently unusable water supplies, by production of water supplies as a by-product of geothermal power development or by any other scientific or other type of means within the respective reservations in the northern Great Plains area.

In view of the Indians' prior and paramount right to the use of all waters to which they are geographically related, it is indisputable that any major diversion of such waters, be it a Federal, State or private use, would constitute an encroachment upon Indian water rights. The northern Great Plains tribes, like all other tribes, need their water resources in order to establish and maintain viable and productive economies on reservation lands. Thus, gone are the days in which Indian tribes will stand idly by and acquiesce in the dissipation of valuable natural resources. The tribes now stand ready and are prepared to fight, both legislatively and judicially, against measures that will result in the future erosion of their invaluable water rights.

The Upper Missouri River basin, in which the 24 federation tribes are located, serves as a useful focal point in drawing out the need for affirmative efforts to protect Indian water rights. It is predicted that coal production in the Upper Missouri River basin will increase from less than 20 million tons in 1972 to nearly 90 million tons by 1980. Although coal mined in this region is being shipped to eastern and Midwest markets, future plans call for large increases in mine-mouth generation of power as well as coal liquification and gasification. Oil shale development, iron ore extraction, steel production, uranium mining and

nuclear power plants are also part of the picture. These projects represent a major industrial reorganization of the United States based on western resources. The Upper Missouri River basin will play a vital role in this industrial reorganization due to the existence of vast, untapped natural resources.

The large increases in new material production will depend upon their rate of conversion into electricity, fuel and fabricated metal. In turn, their conversion rate will ultimately depend upon the availability of water. Water is basic to every natural and manmade raw material energy conversion process. Tens upon thousands of acre-feet of water will be required to accommodate the facilities constructed to mine and process the mineral resources alone. The water for such massive projects will have to come from existing sources of water supply and will ultimately come into conflict with existing water rights, including those of the northern Great Plains Indian tribes. [See, "Water for Industry in the Upper Missouri River Basin," attachment 2.]

Although there are extensive plans for the utilization of the water resources in the Upper Missouri River basin, there is still time to protect the prior and paramount Indian water rights. At the present time, there exists sufficient water to meet all current water requirements. However, as the extensive plans for energy development are implemented, a water shortage will result similar to the one present in the Colorado River basin. Accordingly, protection of Indian water rights can only be accomplished by a program to inventory, and quantify the present and future uses that the tribes have for the utilization of their water.

Such protection necessarily includes a proper and experienced forum in which the Indian water rights may be asserted and determined. To this end the federation has worked hand-in-hand with the Crow and Northern Cheyenne tribes, the Bureau of Indian Affairs, the Solicitor's Office of the Department of the Interior and the Justice Department in developing a plan to protect and preserve the Indian water rights in the upper tributaries of the Missouri River in the State of Montana. The United States together with the Crow and Northern Cheyenne tribes have filed suit to have their rights determined in the waters of the Big Horn and Tongue Rivers and Rosebud Creek in Federal district court in Montana. However, it is now asserted that the Supreme Court decision in *United States* v. *Akin, Colorado River Conservation District, et al.* v. *United States*, —— U.S. ——, 44 U.S.L.W. 437 (decided March 24, 1976), makes the prosecution of these actions in Federal court improper.

It is the position of the northern Great Plains tribes that *Akin* does not preclude the adjudication of Indian water rights in Federal court. In fact, the Montana state courts are precluded from adjudicating these controversies because of limitations placed in its enabling legislation and constitution.

The McCarran amendment does not waive, repeal or consent to the amendment of the provisions in the state enabling acts and constitutions of the northern Great Plains states disclaiming jurisdiction over Indian lands. These acts and/or constitutions contain provisions disclaiming jurisdiction over Indian lands within their boundaries. A typical example is Montana's Enabling Act which states:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes; and that *until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.* (Montana Enabling Act, 25 Stat. 676, 677 [emphasis added].)

This same language appears in Montana's Constitution (art. 12, sec. 2) and in the Enabling Acts and Constitution of North Dakota (25 Stat. 676, 677 and art. 26, sec. 203) and South Dakota (25 Stat. 676, 677 and art. 22, sec. 2). The Nebraska Organic Act, the Wyoming Enabling Act and the Wyoming State Constitution contain similar provisions. (See Organic Act of Nebraska (10 Stat. 277); and Organic Act of Wyoming (15 Stat. 178); and art. 21, sec. 26 of the Wyoming Constitution.)

The disclaimer clause in the Colorado Enabling Act (18 Stat. 474) is different. It provides: "The constitution shall be republican in form and make no distinction in political rights on account of race or color, except Indians not taxed. . . ."

Public Law 280, in addition to conferring certain limited civil and criminal jurisdiction over Indians and Indian country on several enumerated states, provided a vehicle for other states to obtain jurisdiction. Section 6 of Pub. L. 83-280, 67 Stat. 588, 590 waives or repeals the disclaimer provisions in state

enabling acts and gives the consent of the United States for the people of the States to amend their constitutions or statutes containing "legal impediments" to the assumption of jurisdiction. It further provides "[t]hat the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitutions or statutes as the case may be."

The McCarren amendment, by contrast, is silent as to the Indian jurisdictional disclaimer provisions in state enabling acts, state constitutions and state statutes. Congress has properly acknowledged that extension of state jurisdiction to Indians and to Indian country requires: 1) the waiver or repeal by the United States of such provisions in the enabling acts; 2) the consent of the United States for the people or legislation of the states to remove any similar legal impediments within constitutions or statutes, and 3) the actual removal of the impediments by the people of the state. Nothing is more indicative of congressional intent not to confer subject matter jurisdiction on state courts to adjudicate Indian water rights than the absence of any method for removing the legal impediments in the McCarran amendment. Without a repeal or waiver of the disclaimer provision in the state enabling acts, the consent of the United States to the amendment of the similar provisions in state constitutions or statutes, and the actual amendment by the people of the state, the extension of state court jurisdiction to adjudicate Indian water rights cannot be effective.

The Indian tribes of the northern Great Plains recognize that the Supreme Court in *Akin* found the policy of the McCarran amendment to be one of avoiding duplicative and incomplete stream adjudications. It is submitted, however, that the majority opinion confuses this policy with a general preference to adjudicate all rights on a stream in a single forum. It is the view of the Indian tribes that the policy of the McCarran amendment cannot be carried out in the northern Great Plains states for the aforementioned reasons.

Apart from the questions relating to the proper tribunal in which to adjudicate Indian water rights, the tribes of the nothern Great Plains are confronted by other issues that are equally as significant insofar as their water rights are concerned. Indian tribes are acutely aware that the pressures in the western states for non-Indian uses of the region's water could in the foreseeable future, cause a judicial or legislative change in the law that would be adverse to the tribes' future water rights. A foundation must therefore be laid upon which tribal development programs can be guaranteed a firm water right from a secure source.

More fundamentally, however, Indian tribes should be made aware of the development alternatives that exist, based upon comprehensive studies and analysis of the resources, before being asked to assert their rights in a court of law. To put reservation lands to their highest and best use—rather than blindly asserting a water right based upon an agricultural use because quantification is being pressed upon the tribes—comprehensive natural resource development plans with alternatives must be formulated. Also, water quality studies, the ground water inventories, feasibility studies for irrigation projects and the inventory of multiuse dams must be made. These statistics together with the quantification of the physical resource base will allow the scope of present and future use to be determined. It is imperative that the tribes have accurately documented water requirement statistics compiled for utilization of each of the reservations natural resources.

In conclusion the problems inherent in adjudicating the water rights of Indian tribes are already onerous. There is inadequate scientific and other technical data upon which the tribes can make informed decisions and choices regarding the development of their lands and natural resources in order to assert the full extent of their water entitlement. Given the inherent problems that Indian tribes have in adjudicating their water rights, they can ill afford the added burden and expense of attempting to preserve and maintain the federal forum as the appropriate forum for adjudicating their invaluable water rights. As I pointed out earlier, the State of Montana has already moved to dismiss the claims that the United States and the two tribes are asserting in the waters of the Big Horn and Tongue Rivers in Montana. This controversy as to the proper forum does little to further the adjudication and corresponding quantification of Indian water rights in the State of Montana. Consequently, the federation and its member tribes strongly urge that this committee eliminate the "forum shopping" that is presently taking place in the various courts of this country by taking action which will guarantee to the Indian tribes a federal forum in which to adjudicate their water claims.

PREPARED STATEMENT OF NATIVE AMERICAN RIGHTS FUND

My name is Thomas W. Fredericks. I am the executive director of the Native American Rights Fund on whose behalf this testimony is submitted. The Fund is a nonprofit corporation established for the purpose of representing Indian tribes, organizations and individuals in matters having wide-ranging significance to, and impact upon, Indians throughout the United States. The subject matter to which the instant testimony is directed—the proper forum for adjudicating Indian water rights—is one such issue. Indeed, it involves questions crucial to the very lifeblood of Indian property rights and existence.

In this era of ever-increasing water litigation, particularly in the arid and semi-arid Western states, the need for the vocalization of the Indian interest and concommittant protection of Indian water rights against usurpation has never been more pronounced. In response to this need, the Native American Rights Fund submits the following testimony regarding the proper forum for the adjudication of Indian water rights.

The adjudication of Indian water rights claims has recently become a major point of interest in this country. The insurgence of interest for the most part is directly related to the diminution, if not scarcity, of sources of water supply in numerous regions of the United States making all water rights claims a matter of immediate concern. However, over and above the general interest, there is very clearly a special and particular concern directed towards the area of Indian water rights. This concern is the result of one fact and one fact alone, specifically: that Indian water rights are typically the first on the system, and as a consequence, take priority over most, if not all, of the claims asserted by non-Indian water users under state law.

Diminution of Indian water rights is obviously the espoused goal of states and conflicting water rights claimants who utilize already over-appropriated water systems in common with Indian tribes. The States and such claimants will not be satisfied until the destruction or subservience of Indian water rights is accomplished, or at the very least, until Indian water rights claims are shaved of their unique nature and protections. The adjudication of Indian water rights in state courts is one means by which the destruction of Federally-protected Indian water rights is sought to be accomplished.

The U.S. Supreme Court, it is hoped unwittingly, has recently been an instrument in the furtherance of the ruinous goals of those who oppose the preservation of Indian water rights. With apparent imperviousness to fundamental distinctions, the Court held in *Akin* vs. *United States*, (hereinafter *Akin*), decided together with *Colorado Water Conservation District* vs. *United States*, 44 U.S.L.W. 4372 (decided March 24, 1976) that Indian water rights claims could under certain circumstances be litigated in state courts. In instances involving initial state court general stream adjudication proceedings, in which the United States is joined pursuant to the McCarren amendment as a party defendant to represent the water rights owned by the Federal Government, the Court held that Indian claims to the right to the use of water could be determined in state court. With little or no regard for the fact that Indian lands and appurtenant water rights—unlike the lands and water rights comprising other types of federal resources—are privately owned by the respective Indian tribes, the Court swept Indian water rights into the broad panoply of federal, publicly-owned water rights.

The decision in *Akin* by no means purported to relegate the adjudication of Indian water rights claims exclusively to state courts. However, the limited context in which such adjudication is now permitted has so strong a destructive potential, that careful review and analysis is warranted of the factors underlying the need for the designation of Federal court as the appropriate forum for the adjudication of Indian water rights and the express restriction of the litigation of Indian water claims to that forum.

Among the numerous reasons that could be advanced as grounds for restricting the adjudication of Indian water rights claims to Federal court, three stand out. They are: (1) the fundamental animosity directed towards Indians and their property rights by the states in which Indians reside; (2) the total lack of experience by state courts in matters of Indian law and particularly the law concerning Indian land and water rights, and (3) the infringement that state court water adjudications would inflict upon tribal rights of sovereignty.

None of the areas represent novel concepts insofar as Indian land and water rights disputes are concerned. To the contrary each of the following matters has been exhaustively treated and documented by both the courts and Congress. To the extent that questions of jurisdiction have been raised, such questions have

without exception been resolved in favor of a Federal forum for the adjudication of Indian property rights controversies.

1. Animosity between States and Indians.—The most obvious factor underlying the necessity of adjudicating Indian water rights claims in Federal courts stems from the traditional and marked hostility that exists between the various states and the Indians residing therein. Our entire judicial system is founded upon the premise that all parties submitting or defending their claims shall receive a full hearing by an impartial trier of fact and law. Should Indian water claims be relegated to the state forum, in light of past experiences it is highly questionable whether such impartiality would exist.

Congress, itself, has explicitly recognized animosity between the states and Indians as being a factor in support of a Federal forum for disputes involving Indian property rights. The most recent example of this recognition is found in the 1966 report of the Senate Committee in support of the bill which ultimately became 28 U.S.C. 1362, a statute providing for Federal question jurisdiction in the Federal district court over civil actions brought by Indian tribes, irrespective of the amount in controversy. The legislative history indicates that the bill was prompted by *Yoder* v. *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation*, 339 F.2d (9th Cir. 1964), which held that the Federal court had no jurisdiction over Indian property claims unless the amount in controversy involves over $10,000. As noted by the Senate Committee:

> [T] here is great hesitancy on the part of the tribes to use state courts. This reluctance is founded partially on the traditional fear that tribes have had of the states in which their reservations are situated. (S. Rep. No. 1507, 89th Cong. 2d Sess. 2 (1966).)

The Supreme Court has early acknowledged the significance of this animosity. In *United States* v. *Kagama*, 118 U.S. 375 (1885), a decision which upheld a statute making it a Federal crime for one Indian to murder another, the Court noted:

> These Indian tribes *are* the wards of the Nation. They are communities *dependent* for their daily food; dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. 118 U.S. *supra* at 383–84.

The Supreme Court's most recent reference to Indian tribes' widespread fear of being subjected to state jurisdiction is found in *Bryan* vs. *Itasca County, Minnesota*, (docket 75–5027, decided June 14, 1976). The question presented in *Bryan* was whether section 4 of Pub. L. 280, 67 Stat. 589, 28 U.S.C. 1360 constituted a congressional grant of power to the states to tax reservation Indians. That section of Pub. L. 280 made applicable to Indian lands within designated states, except expressly named reservations, state civil laws of general application.

Over strenuous arguments to the contrary, the Court held that section 4 was intended only to "grant jurisdiction over private civil litigation involving reservation Indians in state court" (slip opinion at 11) and not to confer authority upon the subject states to tax Indian lands. In reaching its decision, the Supreme Court had occasion to review the facts surrounding the exemption of certain tribal groups from the operation of Pub. L. 280. While each of the exempted tribal groups had some type of law and order system, most had objected to the assumption of jurisdiction by the states out of fear of inequitable treatment or loss of rights:

> Tribal groups in the affected states which were exempted from the coverage of Pub. L. 280 because they had 'reasonably satisfactory law and order' organization, had objected to the extension of state criminal and civil jurisdiction on various grounds. Three of the tribes exempted objected due to their fear of inequitable treatment of reservation Indians in state courts. H.R. Rep. No. 848, at 7–8. Two of the objecting tribes expressed the fear that 'the extension of State law to their reservations would result in the loss of various rights.' (Id., at 8; slip opinion at 12.)

The reversal of the Minnesota Supreme Court decision upholding state taxation of reservation Indians in *Bryan* clearly indicates, that the Indian fear of being subjected to state and state court jurisdiction is not an unwarranted apprehension. The fear is the result of experience which has time and again shown that the states and their courts do not adequately protect Indian interests.

A glaring and detailed example of the extent and effect of the state hostility to Indian property rights claims is contained in the findings of the district court in *United States* v. *Washington*, 384 F. Supp. 312 (W.d. Wash 1974), *affirmed*, 520 F.2d 676 (1975), an adjudication of treaty-protected, off-reservation Indian fishing rights in the State of Washington. The following three findings are exemplary of

the bias present on the part of states and their officials against the Indians and their property rights. The findings also exemplify the harsh treatment to which Indians have been subjected at the hands of the states:

> 194. In dealing with fishing by members of the Plaintiff tribes in a manner different from that expressly provided in their respective regulations, both the Game Department and the Department of Fisheries have seized nets and other property of those members and have released, confiscated and attempted to prevent the sale and transportation of anadromous fish which are under their respective jurisdictions and which have been caught by those members. (384 F. Supp. supra at 388).
>
> 195. Both the Fisheries and Game Departments have, on several occasions, disposed of or retained for unusually long periods of time (often extending over longer periods than one year) boats, nets, whether attended or unattended, or other property of members of the Plaintiff tribes and fish taken from the nets of such members. The tribal members have not been notified of the institution of any proceedings for, or acquisition of, judicial confiscation or forfeitures of said items by the State. (Id.)
>
> 218. The State and the Director of Fisheries have, by statute and regulation, totally closed a substantial number of the usual and accustomed fishing areas of Plaintiff tribes to all forms of net fishing while permitting commercial net fishing for salmon elsewhere on the same runs of fish. (384 F. Supp. supra at 393.)

An equally significant aspect of *United States* vs. *Washington* is the documentation it provides of the state court's inability to afford a fair and impartial tribunal for the determination of the Indian rights before it. The district court was required twice to stay injunctions issued by the state court and ultimately to enjoin further state court proceedings. See *United States* vs. *Washington,* (W.D. Wash., Civ. No. 9213, memorandum decision, September 12, 1974; memorandum decision, August 6, 1975). The district court was affirmed in all but one minor respect by the Ninth Circuit (520 F.2d 676 (1975)). As District Judge Burns, sitting by designation, noted in his concurring opinion:

> The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten. (520 F. d supra at 693.)

As these few examples demonstrate, ill-feeling between the states and Indians has been recognized and all too clearly documented by both the Congress and the courts. The requirement that Indian claims, particularly such crucial claims as are at stake in Indian water rights disputes, must be pleaded and/or defended before the traditionally hostile state courts ignores that documentation and thereby denies Indians their fundamental right to a fair adjudication.

2. Inexperience of State courts in matters dealing with Indian claims.—A second reason for adjudication of Indian water rights claims in Federal court is that Federal courts, traditionally the forum for Indian claims, have much more expertise in this highly complex and unique area of the law. Conversely, state courts have had little or no experience adjudicating Indian rights, and as succinctly phrased by Mr. Justice Stewart in his dissent in *Akin:*

> . . . the issues involved are issues of federal law. A Federal court is more likely than a state court to be familiar with Federal water law and to have had experience in interpreting the relevant federal statutes, regulations, and Indian treaties. (44 U.S.L.W. at 4379.)

Justice Stewart's dissent echoes the words of the previously noted 1966 Senate Committee Report in support of 25 U.S.C. 1362:

> Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years. (S. Rep. No. 1507, 89th Cong., 2d sess. 2 (1966).)

While state court decisions may be appealed to the Supreme Court, such review is inadequate protection for Indian rights for two reasons. First, as Mr. Justice Stewart observed in his dissent in *Akin,* Federal review is only possible if the Supreme Court chooses to exercise its certiorari jurisdiction (44 U.S.L.W. at 4379). Second, Indian water rights, in large part, turn on questions of fact which are not readily subject to review. Such questions include for example, boundary and land ownership issues, the number of acres which are "practically irrigable,"

and the amount of water required for irrigation. (*Arizona* vs. *California*, 373 U.S. 546, 600–601 (1963).)

Any doubt as to whether this ill-feeling and inexpertise would inhibit a fair adjudication of Indian claims in state court is dispelled by reference to the number of recent cases in which various Indian claims have been decided adversely by state courts, but which have been reversed or vacated by the Supreme Court. The courts most recent reversal of a state court decision involving Indian rights is, *Bryan* vs. *Itasca County, Minnesota*, supra. There the State Supreme Court affirmed the lower court holding that the grant of civil jurisdiction to the state in section 4(a) of Pub. L. 280 included the power to tax.

In its past four terms, the Court has reversed or vacated six such decisions and in five instances the decision was unanimous. These six cases are: *McClanahan* vs. *Arizona Tax Commission*, 411 U.S. 164 (1973), reversed (9:0); *Tonasket* vs. *Washington*, 411 U.S. 451 (1973), vacated (9:0); *Mattz* vs. *Arnett*, 412 U.S. 412 (1973), reversed (9:0); *Washington Game Dept.* vs. *Puyallup Tribe*, 414 U.S. 44 (1973), reversed (9:0); and *Antoine* vs. *Washington*, 240 U.S. 194 (1975), reversed (7:2).

An additional state decision, *Mescalero Apache Tribe* vs. *Jones*, 411 U.S. 145 (1973), was reversed in part (9:0) and affirmed in part (6:3). In two cases arising in the Federal courts, the states' positions were unanimously rejected. *Oneida Indian Nation* vs. *County of Oneida*, 414 U.S. 661 (1974); *United States* vs. *Mazurie*, 419 U.S. 544 (1975). In a third case originating in Federal court, *Moe* vs. *Salish and Kootenai Tribes*, 44 U.S.L.W. 4535 (decided April 27, 1976), the state's position, with one exception was unanimously rejected.

In contrast, only one state decision, *DeCouteau* vs. *District County Court*, 420 U.S. 425, *reh. denied*, 421 U.S. 939 (1975), has been upheld, and that by a divided 6:3 vote. In only one case, *Akin*, initiated in Federal court, did a sharply divided Court go against the Indian position.

The state fared little better in earlier terms between 1959 and 1971. Positions taken by the states and/or their courts were repudiated in nine cases, six of which were rejected by unanimous vote: *Williams* vs. *Lee*, 358 U.S. 217 (1959) (9:0); *Seymour* vs. *Superintendent*, 368 U.S. 351 (1962) (9:0); *Metlakatla Indian Comm.* vs. *Egan*, 369 U.S. 45 (1962) (9:0); *Arizona* vs. *California*, 373 U.S. 546 (1963) (8:0); *Warren Trading Post* vs. *Arizona Tax Commission*, 380 U.S. 685 (1965) (9:0); *Poafpybitty* vs. *Skelly Oil Co.*, 390 U.S. 365 (1968) (8:0); *Menominee Tribe* vs. *United States*, 391 U.S. 404 (1968) (6:2); *Choctaw Nation* vs. *Oklahoma*, 397 U.S. 620 (1970) (5:3); and *Kennerly* vs. *District Court*, 400 U.S. 423 (1971) (7:2).

During that same period, state positions were upheld only three times: *Federal Power Comm.* vs. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) (6:3); *Organized Village of Kake* vs. *Egan*, 369 U.S. 60 (1962) (9:0); and *Puyallup Tribe* vs. *Dept. of Game*, 391 U.S. 392 (1968) (9:0). The most recent case in which a state decision favorable to Indians was reversed was the Courts' 1949 decision in *Oklahoma Tax Commission* vs. *Texas Co.*, 336 U.S. 342 (1949). In that case, the Court overruled its own prior decision upon which the state court had relied.

As this survey of recent Supreme Court decisions involving Indian disputes indicates, denial of a Federal forum is both illogical and unfair. Relegating Indian claims to state courts is illogical since the state courts have heretofore rarely been exposed to the complex Federal treaties, statutes, regulations and common law which are the framework within which such claims must be examined. Denial of a Federal forum is also unfair since Federal review is discretionary and does not easily reach crucial facts already determined by the state court.

3. Indian tribal sovereignty and Federal preference.—The third reason militating in favor of the adjudication of Indian water rights claims in Federal courts is the sovereign status of Indian tribes and the related, well-established, judicial and congressional policy favoring the adjudication of Indian property rights controversies in Federal courts. Indian sovereignty is recognized in the Indian commerce clause of the United States Constitution, article I, section 8 ,clause 3, which empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Indian tribe is thus acknowledged as the entity authorized to act on behalf of the Indians as a unit.

In *Worcester* vs. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) and in the recent decision of *McClanahan* vs. *Arizona Tax Commission*, supra, the Supreme Court validated the theory that the Constitution recognizes that Indian tribes have a status equal to rather than subject to the several states. As noted in *McClanahan*, the Supreme Court has long recognized that " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " (411 U.S. 164, 168 quoting *Rice* vs. *Olson*, 324 U.S. 786, 789 (1945).) The sovereignty of the Indian tribe is reflected in the tribes' separate judicial system, its power to tax, its power of eminent domain, and in its "police power." (See, *Iron Crow* vs.

Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Cohen, *Federal Indian Law*, 122 (1942); 55 I.D. 14, and Cohen, *Indian Rights and Federal Courts*, 24 Minn. Law Rev. 145 (1940).) Requiring state adjudication of Indian water claims denies this tribal sovereignty.

Indian tribes have therefore historically opposed any state jurisdiction. See, e.g., the legislative history of 25 U.S.C. 1321 and 1322, amending Pub. L. 83–280, 67 Stat. 589, to require Indian consent to the exercise of state jurisdiction, and of 25 U.S.C. 1323, providing for the retrocession of state jurisdiction acquired without Indian consent. See also, *Kennerly* vs. *District Court*, 400 U.S. 423 (1971); *Fisher* vs. *The Sixteenth Judicial District of Montana*, —— U.S.L.W. —— (docket 75–5366, decided March 1, 1976).

Congress, by in large, has recognized the inconsistency between tribal sovereignty and subjugation of Indian claims to state jurisdiction. Numerous statutes reflect a clear policy favoring federal jurisdiction over property disputes involving Indians. One such congressional enactment is 25 U.S.C. 345 which grants exclusive Federal jurisdiction for controversies over the Indian right to allotment, irrespective of the amount in controversy or of the existence of a Federal question. Even 25 U.S.C. 357 which is silent as to forum, but which makes state substantive condemnation law applicable to some Indian lands, does not confer jurisdiction on state courts. (*Minnesota* vs. *United States*, 305 U.S.C. 382 (1939)). This holding was explicitly approved and followed in the later enactment of 28 U.S.C. 1362.

Pursuant to Pub. L. 83–280, 67 Stat. 588, codified as 18 U.S.C. 1162, 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321 and 1322, states were granted limited civil jurisdiction over Indian country. Congress, however, explicitly denied state court jurisdiction in situations involving "the ownership or rights to possession" of "any real or personal property including water rights, belonging to any Indian or Indian tribe . . . or any interest therein." (28 U.S.C. 1360(b) and 25 U.S.C. 1322(b).)

The same policy favoring a Federal forum is conclusively shown in the previously discussed committee reports on 28 U.S.C. 1362:

> [T]raditionally, the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. (*Minnesota* vs. *United States*, 305 U.S. 382 (1939). H.R. Rep. 2040, 89th Cong., 2d sess. 2 (1966), reprinted in U.S. Code Cong. and Adm. News (1966) 3145, 3146–3147.)
>
> [T]he issues involved in cases involving tribal lands . . . are Federal issues and particularly as to this class of cases it is appropriate that the actions be brought in a United States district court. (H.R. Rep. 2040, 89th Cong. 2d sess. 2 (1966), reprinted in U.S. Code Cong. and Adm. News 3145, 3146–3147 (1966).)

Indian water rights are appurtenant to reservation lands and are also distinct property rights. The issues involved are clearly Federal issues and, in light of the firmly established concepts of tribal sovereignty and of Federal preference, are most properly raised in a Federal forum.

4. Conclusion.—It must be acknowledged that underlying any consideration of the proper forum for adjudication of Indian water rights claims is the fact and recognition of the supreme importance of water rights to Indian tribes. In the arid and semiarid Western states, water is a scarce and contested resource. There is insufficient water to meet present demands. However, Indian reservations, unlike the short-termed economic enterprises who make demands upon the water supply, will not simply move on. They will remain and continue to occupy and work the lands, but in order to do so they must have a water supply of sufficient quantity to meet their needs. Thus, water rights are the Indian's most valuable rights. In the final analysis, as Mr. Justice Stewart noted in *Akin*, what is involved is a "determination of questions of life-and-death importance to Indians." (44 U.S.L.W. at 4379.)

Thus, it is imperative that a federal forum be provided for the resolution of controversies regarding Indian water rights claims. Without a Federal forum, Indians must assert or defend one of their most precious rights before a traditionally hostile state court, which is inexperienced, and from which there may be no adequate appeal. Further, only a Federal forum is consistent with the recognized sovereignty of Indian tribes and with the general and longstanding congressional and judicial policy favoring adjudication of Indian claims in Federal courts. We as a nation have come too far in recognizing what is due the Native American, we cannot belittle the importance of water rights—nor can we ignore the logic and sense of fairness which compells recognition that a Federal forum is exclusively the proper forum for adjudication of Indian water rights claims.

Resolution No. R-18-76

RESOLUTION

COLORADO RIVER TRIBAL COUNCIL

A Resolution to Support amendment of the McCarran Act, 43 U.S.C. 666

Be it resolved by the Tribal Council of the Colorado River Indian Tribes, in special regular meeting

assembled on June 11, 1976

WHEREAS, water and water rights are of critical importance to the Colorado River Indian Tribes, and to the life and welfare of their members, and

WHEREAS, other Indians and Indian tribes are similarly situated, and protection of ancestral and adjudicated Indian water rights is a matter of national concern, and

WHEREAS, non-Indian interests are aggressively contesting and seeking to appropriate water and water rights belonging to Indians, including the Colorado River Indian Tribes, and

WHEREAS, in resisting such efforts Indians, including the Colorado River Indian Tribes, do not believe that their interests will be adequately protected if they are subject and restricted to proceedings under state jurisdiction, and

WHEREAS, the United States Supreme Court in its recent decision in the cases

The foregoing resolution was on June 11, 1976 duly approved by a vote of 5 for and 0 against, 1 abstaining by the Tribal Council of the Colorado River Indian Tribes, pursuant to authority vested in it by Section 1(a), Article VI of the Constitution (or By-Laws) of the Tribes, ratified by the Tribes on July 17, 1937, and approved by the Secretary of the Interior on August 13, 1937, pursuant to Section 16 of the Act of June 18, 1934, (48 Stat. 984). This resolution is effective as of the date of its adoption.

COLORADO RIVER TRIBAL COUNCIL

By

Anthony Drennan, Sr.
Chairman

Secretary

Approved:

Superintendent

of Akin, et al v. United States and Colorado River Water Conservation District, et al v. United States ruled that state courts had jurisdiction over the adjudication of Indian water rights, and that Indian water rights properly should be adjudicated in state courts, and

WHEREAS, the Colorado River Indian Tribes consider the effect of that decision to seriously jeopardize their water rights.

NOW, THEREFORE BE IT RESOLVED by the Tribal Council of the Colorado River Indian Tribes that the Colorado River Indian Tribes enthusiastically endorse the efforts being made by the National Congress of American Indians, and others, to obtain the introduction in the Congress of the United States, and the enactment into law, of an amendment to the McCarran Act, 43 U.S.C. 666, to the effect that consent given by the McCarran Act to the joinder of the United States as a defendant in suits or proceedings for the adjudication or administration of rights to the use of water does not extend to, or in any way include or otherwise affect, rights to or interest in the use of water of or by Indian nations, tribes, or people, and further providing that Indian rights to the use of water are specifically immune from state jurisdiction or control, or from administration or adjudication by any state, state court, state agency, state tribunal or administrative officer, or other state entity or proceeding.

(INITIAL REPORT)

DECLARATION OF INDIAN RIGHTS TO THE NATURAL RESOURCES
IN THE NORTHERN GREAT PLAINS STATES

Submitted by Dan Old Elk, President
Native American National Resource Development Federation (NANRDF)

The Indian tribes and people of the Northern Great Plains being confronted with an all pervasive crisis threatening the present and future uses of their natural resources, including but not limited to their land, right to use of water and their coal, do hereby declare as follows:

The Northern Great Plains area of the United States is presently attracting international attention due to the energy crisis which makes the vast coal resources of this area very appealing for immediate development. The development of this coal and the concomitant use of water, air, and other natural resources threatens the viability of our environment and the continued existence of the twenty-six tribes which occupy the Northern Great Plains within the states of Montana, Wyoming, North Dakota, and Nebraska.

These tribes would be severely burdened with immense consequences resulting from any natural resource development. It is for this reason that these tribes desire to submit the following declaration for inclusion in the report of the Northern Great Plains Resource Program. The tribes have been asked to participate in numerous work group statements on this matter, but it is readily apparent that the major impact upon the survival of these Indian tribes will be foisted upon the erosion of their water rights and the depletion of water resources due to the need for massive quantities of water to develop the coal. The Indian water rights here involved, then, are like

the Indian fishing rights considered by the United States Supreme Court in United States v. Winans, 198 U.S. 371, 381 (1905); they are "not much less necessary to the existence of the Indians than the atmosphere they breath."

The Indian tribes of the five states do hereby give notice to the world that they will maintain their ownership to the priceless natural resources which are geographically- and legally related to their reservations. Indian tribes and people, both jointly and severally, have declared and the courts have sustained that the American Indian tribes of the Northern Great Plains have the prior and paramount rights to the waters of all rivers, streams, or other bodies of water, including all tributaries thereto, which flow through, arise upon, underlie or border upon their reservations. These prior and paramount rights would extend to all waters that may now or in the future be artificially augmented or created by weather modification, by desalination of presently unusable water supplies, by production of water supplies as a byproduct of geothermal power development, or by any other scientific or other type of means within the respective reservations in the Northern Great Plains area.

In view of the tribes' prior and paramount rights to all the waters to which they are geographically related, it is self-evident that any major diversion of said waters for any purpose would constitute an encroachment upon Indian water rights. All federal agents or agencies, including but not limited to the Bureau of Reclamation, Corps of Engineers, states, persons, parties or organizations are, therefore, put on notice

that any diversion or use of such tribal waters shall be at their own risk.

LEGAL BASIS FOR INDIAN WATER RIGHTS

The Indians' prior and paramount rights were sustained in the United States Supreme Court case familiarly known as the "Winters Doctrine", Winters v. United States, 207 U.S. 564 (1908). The Court held in that case that the right to use of water from the Milk River, in the State of Montana, which bordered upon the Fort Belknap Indian Reservation was reserved by the government in the treaty for the benefit of the Indians of that reservation.

The Winters Doctrine embraces reservation rights whether created by treaty, statute or executive order, before or after statehood.

- U.S. v. Walker River Irrig. Dist., 104 F.2d 334 (1939)
- Ariz. v. Cal., 373 U.S. 600

The waters reserved are exempt from appropriation by non-Indians pursuant to state law.

- Winters v. U.S., supra
- U.S. v. Ahtanum Irrig. Dist., 235 F.2d 321 (9th Cir. 1956)

The courts have consistently held that the nature of the right was such that sufficient water was reserved for the present and future needs of the Indians, whatever the use and without limit.

- Ariz. v. Cal., 373 U.S. 546 (1963)

It is the definition of the purpose of each reservation that requires careful consideration. The language of the various

treaties speaks in terms of providing a permanent home or place to live, free from encroachment by the non-Indian.

- See Treaty of Fort Bridger, July 3, 1858 (15 Stat. 643)

Although the fundamental rules of Indian treaty construction have been variously stated, there are essentially three well defined and well established rules.

The first fundamental rule is that "treaties with Indians must be interpreted as they would have understood them."

- Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970)

- Jones v. Meehan, 175 U.S. 1, 10-11 (1899)

- United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938)

- United States v. Winans, supra

A second rule of Indian treaty construction is that doubtful expressions are to be resolved in favor of the Indian parties to the treaty.

- McClanahan v. State Tax Comm'n of Arizona, _____ U.S. _____, 36 L.Ed.2d 129, 137 (1973)

- Carpenter v. Shaw, 380 U.S. 363, 367 (1930)

- Standing Rock Sioux Tribe v. United States, Ct. Cl. 813 (1963)

A third important canon of Indian treaty construction is that Indian treaties are to be constructed in favor of the Indians.

- Choctaw Nation of Indians v. United States, 318 U.S. 418, 431-432 (1943)

- Tulee v. Washington, 315 U.S. 681, 684-85

- United States v. Shoshone Tribe, supra

Executive order reservations are no different than treaty reservations when dealing with the question of Indian water rights.

- Ariz. v. Cal., supra

- U.S. v. Walker Irrig. Dist., supra

Language in a federal statute affecting the rights of Indians is to be construed in the same manner as is language in treaties with Indians.

- Squire v. Capoeman, 351 U.S. 1, 6 (1956)

HISTORICAL AND CONSTITUTIONAL BASIS OF INDIAN WATER RIGHTS

It is essential that any consideration of the nature of the Indians' rights to the use of water be based upon their inherent sovereign power of self-government.

Indian tribes from time immemorial had the right to use the water in the streams in the area wherever they made their homes; they had the right to use the lands to hunt and fish. Indian lives generally were oriented to the rivers which made habitation and survival possible in contrast to the arid lands which extended for miles on each side of their ancient homes. Title to these valuable property rights has always been to the Indians and we hold that these rights to the use of water are still those of the Indian peoples. The Indian tribes hold that (See Attachment No. 1) they retained title to all that they did not cede or give up, including the invaluable rights to the use of water in the streams and rivers which arise, border, traverse, or underlie their lands and which were retained by them when their reservations were established. These rights are to be treated as private in character and not as federally reserved rights to the use of water owned by the public as a whole.

These IMMEMORIAL RIGHTS are protected by the United States Constitution. The Supremacy Clause proclaims, "The Constitution and the laws of the United States which shall be made in pursuance thereof; and all TREATIES made, or which shall be made, under authority of the United States, shall be the supreme law of the land." The COMMERCE CLAUSE provides

that the Congress has the authority "to regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes."

Water rights of the Indians were not given up or ceded in any treaties and the United States Supreme Court enunciated this fact in the case of Winters v. United States in 1908, as above stated. Today, more than ever, the Indian finds himself in a life and death competition for a water supply rapidly becoming inadequate to meet all demands. The biggest problem facing them as Indian people today is the need to determine the extent of the rights or in practical words, the amount of water they have a right to use.

The tribes understand that they will be able to promulgate water codes and under authority from the Secretary of Interior, they will be able to regulate and distribute waters among the people on the various reservations. This will give them a counterpart to the state procedures for filing of water rights and uses and will keep the states from trying to regulate their waters.

Historically, non-Indian users of water have made investments utilizing water in complete disregard to the prior and paramount rights of the Indian tribes. Many examples prove that local and state interests have encouraged the development of water resources even though the supply was subject to Indian rights, choosing to ignore those superior rights in hopes that Congress, at some future date, would "buy out" the Indians as has been somewhat of an unofficial policy in the constant erosion of Indian property, land, minerals, and water. The Indian tribes

cannot afford to be "put off", "bought off" or "turned off" any longer in dealings pertaining to their valuable resources.

PRINCIPLES FOR PLANNING THE DEVELOPMENT OF INDIAN WATER, LAND AND MINERAL RESOURCES

There is no question regarding the need for thorough evaluation of the extent in value (including social and cultural values) of Indian natural resources on the Northern Great Plains and areas draining the lands and reservations of each of the twenty-six Indian tribes concerned. At stake is the future economic development and well-being of Native Americans residing on Indian reservations in Montana, Wyoming, North Dakota, South Dakota, and Nebraska. Adequate methods for evaluating the feasibility, economics, or desirability of the development of Indian water, land, and mineral resources have been sorely lacking for several decades.

On October 30, 1973, new "Principles and Standards for Planning Water and Related Land Resources" were promulgated as federal law by the U.S. Water Resources Council[1/] which clearly require of the trustee a rigorous analysis of natural development programs including equal detail for all resource development alternatives. The principles were established for planning the use of water and land resources of the United States, including Indian reservations, to achieve objectives determined cooperatively through the coordinated actions of federal, state, and local governments, (including Indian tribes and individuals) private enterprise, organizations, and individuals.

1/ Published in the Federal Register, September 10, 1973, Volume 38, No. 174, Part III, Enacted October 30, 1973

They provide the basis for federal participation; including federal cooperation with Indian tribes, with river basin commissions, states, and others in the preparation, formulation, evaluation, review, revision, and transmittal to the Congress for natural resource development plans and programs. The plans and programs include those affecting states, regions, Indian tribes, and river basins for planning of federal and federally assisted water and related land resource programs and projects and certain federal licensing activities.

The overall purpose of water and land resource planning is to promote the quality of life by reflecting societies' preference (including Indian country) for attainment of the objectives defined below:

a. To enhance national economic development by increasing the value of the nation's output of goods and services and improving national economic efficiency.

b. To enhance the quality of the environment by the management, conservation, preservation, creation, restoration or improvement of the quality of certain natural and cultural resources and ecological systems.

The principles and standards establish a system of accounts which will display both beneficial and adverse effects of each natural resource plan and each alternative to that plan and will compare the benefits between regional development, social well-being, and environmental effects. The display of beneficial and adverse effects will be prepared and presented in such a manner that different levels of achievement and/or development in each account can be readily discerned and compared by the

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public and all interested parties clearly indicating the trade-offs among alternative plans.

For purposes of accounting a clear conveyance of information to the public, the distribution of beneficial and adverse effects will be shown to whomever they accrue (specifically to the recipient of the project benefits). This will include display of the distribution of both beneficial and adverse effects to regions, income classes, and interest groups relevant to the particular plans and will reflect not only economic costs but social, cultural and environmental effects as well. The system of accounts will also display the beneficial and adverse effects of a particular project in relation to the rest of the nation.

The Water Resources Council will establish procedures for relating regional accounts to the rest of the nation. These procedures, however, have not yet been developed, but are presently being drafted. The use of such reporting regions will not, however, rule out the use of other regions whose delineations are important (especially Indian reservations) in measuring beneficial or adverse effects on regional developments.

This is an extremely important aspect of the principles and standards as they affect Indian natural resource development projects. That is, the principles and standards can be used on a regional basis with the Indian reservation being a designated region, rather than an entire river basin, state or other large geographic entity that would dilute the actual benefits or the adverse effects on Indian people on a given reservation.

The evaluation, systematic display, and comparison of

alternative plans for a project affecting a state, Indian tribe, region, or river basin will provide the basis for selecting a plan best suited for those parties most heavily impacted. It is important to recognize that the selection of a plan is ultimately made by policy-makers and not by administrators or technicians. These new methods, however, provide better decision-making tools and information for the policy-makers in rendering their decision.

The Water Resources Council implemented the principles by establishing standards for planning water and land resources in accordance with the Water Resources Planning Act (P.L. 89-80). The standards were implemented and published at the same time as were the principles.

The effect of the principles and standards for planning for Indian water and land resources is that they must be used by river basin commissions, federal-state organizations, and each of the federal departments and agencies. In addition, the Office of Management and Budget, the Council on Environmental Quality, and other organizations in the executive office of the President must use these principles and standards in their review of proposed project, basin, or regional plans, including those affecting Indian natural resources whether on or off the reservation. It is interesting to note that the Chairman of the United States Water Resources Council is the Secretary of the Interior -- the trustee of Indian people.

The foregoing principles, standards, and procedures must be used with diligence and caution by Indian leadership.

There is little question that they provide a powerful tool or weapon with which Indian tribes can demand of the trustee rigorous forthright analysis of any project. However, as with any tool or weapon, it can be rustled from the user and used against him. In other words, the principles have the potential of being a two-edged sword: for requiring methods for detailed analysis of projects which are beyond financial ability of the tribes to accomplish. Therefore, we require that the cost of project analysis be paid in full by the trustee.

An additional caution is that the principles and standards are only as good as the information used to address them; as with the computer or any accounting technique -- if you put garbage in you can only get garbage out. We, therefore, demand of the trustee, other federal agencies, states, local governments, and other parties, that the principles be addressed not only rigorously, but with candor and factual information.

The need for the foregoing principles and standards especially for evaluation of natural resource development programs in Indian country was clearly stated in the recently released National Academy of Sciences/National Academy of Engineering "Report to the Energy Policy Committee of the Ford Foundation", regarding land use, surface ownership, and mineral ownership:

Land Use, Surface Ownership, and Mineral Ownership

> "The questions of land, surface and mineral ownership in the coal areas are complex and in many cases still unresolved. The federal government controls much of the surface and even larger fraction of the minerals. Indian nations also claim ownership of large areas, sometimes in conflict with other private claimants and the federal government.

> In addition, the individual states hold significant tracts, as do the railroad companies. The ownership pattern varies, but the checkerboard is common over much of the area. No reliable statistics have been compiled for either surface or mineral ownership .... Although leasing of federally owned coal deposits has been suspended since 1970, leasing of coal lands and other ownerships has continued. In Montana alone, more than 600,000 acres are currently held in coal leases, although only a fraction of those are suitable for strippable deposits."

Filling the foregoing lack of information identified by the NAS and NAE Report is the focal point and objective of the Northern Great Plains Resources Program. The NGPRP study covers the five states of Montana, Wyoming, North and South Dakota, and Nebraska, and is being coordinated by the United States Department of Interior.

These new methods apply not only to water resource developments, but to related land resources, including mineral developments in which the federal government has a stake in monetary terms or as trustee.

The Northern Great Plains Resources Program, in cooperation with the Indian tribes, must identify not only short-term opportunities for natural resource management in Indian country, but must address the problems of natural resource management for future generations of Indian tribes and Indian people.

ISSUES TO BE ADDRESSED BY THE TRIBES OF THE NORTHERN GREAT PLAINS PRIOR TO DETERMINING THE EXTENT OF DEVELOPMENT OF THEIR MATERIAL RESOURCES

The vast natural resources located on or near Indian reservations in the Northern Great Plains offer a potential for significant economic development. Development will also present some major problems for the Indian people in the area. In order to make intelligent choices as to the nature and extent to which the development of their natural resources, including coal, water and air should take place, the tribes must have before them complete information on the nature and value of their coal, water and land resources, together with the political, cultural, economic and environmental effects development will bring. This data must be made available before development takes place, so that effective planning is possible. In the following sections, it is demonstrated, using the little data which is available, the enormous size of the resources and the potential problems which accompany the use of these resources. It is emphasized that huge information gaps remain; it is the duty of the federal government in carrying out its trust responsibility to the Indian people residing on the reservations to gather this data and supply it to the Indian people who will be affected.

The National Water Commission, in its final report to the President, recommended:

> At the request of any Indian Tribe, the Secretary of the Interior or such other Federal officer as the Congress may designate should conduct

the mid-April 1973 edition of Coal Age (page 117) reports that there are eight billion tons of strippable coal on the Crow and Northern Cheyenne Reservations. (The fact that this information must be obtained from a trade publication graphically illustrates the government's failure to provide meaningful information and guidance to the Indians of the Northern Great Plains.)

A second factor in determining the value of coal resources, aside from the quantity of coal available, is its quality. In particular, the sulfur content and heat rating of the coal are important. This information is usually made available to the tribes only after a coal prospecting permittee has completed its exploration and is ready to invoke its preference right to lease selected portions of the permit area. By then, of course, the tribes are unable to seek an adjustment of the royalty to reflect favorable data, since the royalty and bonus payments have been irrevocably fixed under the terms of the contract. Needed immediately are new procedures for exploration, production, and development leases on Indian lands.

A third variable in the value of the coal resource is the cost associated with production. One of the most important variables in production cost is the stripping ratio; the thickness of the overburden covering the coal compared to the thickness of the coal seam. The lower the stripping ratio; the less it costs to mine. Stripping ratios of 16:1 and higher are commonly encountered at eastern and mid-western strip mines, while stripping ratios of up to 12 to 1 are common in many

> studies in cooperation with the Indian Tribes of the water resources, the other natural resources, and the human resources available to its reservation. An object of the studies should be to define and quantify Indian water rights in order to develop a general plan for the use of these rights in conjunction with other tribal resources . . . . Congress should appropriate funds to support the studies . . . . (Recommendation 14-1.)

This recommendation should be carried out immediately with respect to the twenty-six Indian tribes in the Northern Great Plains.

In considering the development issue, the following questions need to be answered:

A. How much Indian land will be affected by coal development operations? Figure 1.1 is a map showing the location of strippable coal reserves in the Northern Great Plains compared to the areas of strippable coal reserves on Indian reservations in the five states comprising the Northern Great Plains. Table 1.1 shows that a large proportion of the five Northern Great Plains states is underlain by coal deposits. It can be seen that substantial portions of nine Indian reservations[2/] within those states have significant coal resources. Indeed, three of the reservations are entirely underlain by coal-bearing rock. Thus, if coal reserves on these reservations were developed to the fullest extent possible, the land base of those tribes

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2/ Cheyenne River, Standing Rock, Blackfeet, Rocky Boys, Fort Peck, Fort Berthold, Wind River, Northern Cheyenne, and Crow.

could be seriously eroded, or even destroyed. As we note in Table 1.1 the data on coal under Indian lands is very incomplete and the estimates offered are highly speculative.

B. How much Indian coal can be recovered economically?

The Bureau of Mines has estimated that the nine reservations contain 36 billion tons of coal. However, this figure is misleading. Much of the total coal reserve cannot be recovered by any of the mining techniques known today. Another type of figure frequently cited to show coal reserves, the recoverable reserve, is also irrelevant in the Northern Great Plains. This figure includes all coal that can be recovered by present technology through underground or surface mining. However, in the Northern Great Plains, where there are huge reserves of strippable coal in competition with coal on Indian lands, it is questionable that coal recoverable only by underground mining will be exploited in the near future.

Furthermore, the great extent of coal reserves now classified as mineable by underground methods may, in the future, become strippable through technological, economic, and/or legislation pending in Congress.

The key figure, then, is the strippable reserve. Although approximate figures are available on a state-wide basis, the strippable reserves for the nine coal-rich Northern Great Plains reservations are unknown.

Once again, crucial data necessary for intelligent decision making is unavailable to the Indians. We do know that we are talking about huge amounts of strippable coal. For example,

of the western states (see Table 3.3 of the N.A.S. Report)[3/] It appears that the stripping ratio for Indian coal in the Northern Great Plains is more favorable than average. For example, the stripping ratio for one tract of coal land owned by the Crow Tribe in the ceded portion of their reservation averages between 3.5 and 4:1.

Another important factor in determining the value of the Indian coal resources includes the present and future market for comparable quality coal, freight rates, and a survey of royalties paid to other coal owners.

C. How much water will be needed to mine and convert these coal resources? Table 4.1, attached, of the N.A.S. Report, shows the gross amount of water available in several key streams in the Northern Great Plains. (This total is subject to depletion for irrigation, industrial and municipal uses, as well as evaporation.) These depletions may substantially reduce the amount of water actually available -- estimates are that only 241,000 acre-feet are available from the Tongue River and 287,300 acre-feet from the Powder River. (See N.A.S. Report 59.)

Although it appears that there is a huge quantity of water available for coal development, in fact, the large energy companies have already applied for most of this available water. According to the newsletter of the Northern Great Plains Resources Council (February, 1974), energy companies have already filed

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3/ National Academy of Sciences, "Rehabilitation Potential of Western Coal Lands," a report to the Energy Policy Project of the Ford Foundation (Washington, D.C., 1973).

state appropriation, appropriation applications and applications and requests with the Bureau of Reclamation in the following amounts:

River	Total Appropriations, Options, and Requests
Powder	336,375
Tongue	225,175
Bighorn	2,193,000
Yellowstone	824,250
TOTAL	3,588,800

The above total is three times the highest quantity of water required in the NGPRP forecast for the entire region.

In the following paragraphs, we discuss water usage associated with various facets of the coal mining, processing, and conversion that may well take place in the Northern Great Plains.

1. Mining.

According to the N.A.S. Report (page 63), actual mining operations require very little water, most of which can be obtained readily from shallow wells. Nonetheless, the drilling of such wells could lower the water table in local areas.

2. Surface Mine Rehabilitation.

The N.A.S. Report (pp. 6465) indicates that supplemental irrigation is essential in most areas, if revegetation is to succeed. The report states that from .50 to .75 acre-feet per acre will be required for this purpose annually. However, every rehabilitation

study to date concludes that rehabilitation plans on the Northern Great Plains, which are dependent on supplemental irrigation, are both ecologically and economically unsound. In other words, there is a real question of whether these areas should be disturbed at all, since there is no guarantee that these lands can ever be rehabilitated.

3. Coal Conversion.

The N.A.S. Report (page 160) indicates that one 1,000 megawatt electric generating station, using an evaporative tower for cooling and operating at full capacity requires 20,000 acre-feet of cooling water annually. For a similar plant using a cooling pond, instead, the requirement drops to 12,000 acre feet per year; and to only 2,000 acre-feet per year if a dry cooling tower is used. None of the utilities in the Northern Great Plains is planning to use this more expensive cooling method, despite the huge water saving that could be achieved. Since the North Central Power Study indicates that up to 50,000 megawatts of electric generating capacity could ultimately be constructed in the Northern Great Plains, cooling water requirements could conceivably rise as high as one million acre-feet. (The North Central Power Study (Vol. 1, p. 16) contains a somewhat smaller estimate -- 855,000 acre-feet per year.)

A plant producing 250 million cubic feet a

day of synthetic natural gas from coal would require approximately 30,000 acre-feet of water per year. (In 1972, Consolidation Coal Company proposed a complex of four such plants on the Northern Cheyenne Reservation.) A coal liquefaction process, whereby synthetic crude oil is extracted from coal, is now being developed. A plant producing 100,000 barrels per day would consume approximately 65,250 acre-feet of water per year. N.A.S. Report, p. 160.

D. How will land resources be affected? The coal mining and conversion process uses up another valuable Indian resource -- land. In many areas, where rainfall is very sparse, or reclamation efforts are minimal, strip-mined lands may be irretrievably lost for other uses, such as grazing, housing, etc. Even if reclamation is successful, much of the land to be strip-mined and all land needed for conversion facilities, transmission lines, roadways, and other rights-of-way, will be lost for the life of the mining/conversion operation -- often more than a quarter of a century. The areas subject to potential damage from strip mining are significant. According to the N.A.S. Report (Table 3.5) between 1965 and 1972, Montana coal mining operations disturbed 46 acres per million tons of coal mined. At that rate, mining the 8 billion tons of strippable coal on the Crow and Northern Cheyenne Reservations would consume 368,000 acres, 18% of the total area of the two reservations.

E. What will be the major environmental effects?

1. The major environmental impacts of strip mining

and coal conversion include:

a.) Pollution of ground and surface waters.

b.) Deposition of salts and toxic minerals, which render large areas permanently infertile.

c.) Disruption of aquifers and aquifer recharge areas, this may result in dry wells, lowered water tables, increased erosion, and flood damage.

d.) Air pollution associated with the dust from mining. If a conversion process, such as gasification or electric power production is involved, there will be air pollution from particulate matter, sulfur oxides, nitrogen oxides, radioactivity, and trace metals. In addition, there will be large amounts of sulfate sludge and flyash produced by air pollution abatement devices that must be disposed of.

e.) Associated with strip mines and coal conversions are a network of roads, power transmissions lines, slurry pipelines, and railroads, which cause pollution from dust and erosion, as well as visual pollution.

If there is to be any hope of adequate reclamation of strip mined areas, the planning process must begin well before actual mining. Data that must be gathered includes:

a.) Climatological and meteorological data.

b.) Indigenous plants and animals.

c.) Thorough analysis of the physical and chemical components of soil overburden.

d.) Description of groundwater supplies, flows and uses.

e.) The location and nature of unusual scenic, historical, archeological, and cultural values in the area to be mined.

2. Competent experts will be needed to interpret this data, to help formulate a mining and reclamation plan, and to make sure the plan is enforced. These experts must be capable of explaining the data and resulting options in non-technical terms so that tribal members can understand all alternatives before making decisions.

F. What will be the social and cultural effects?

Mining operations will bring a large influx of outside workers, technicians, and managers onto the reservations. If coal conversion facilities are located near the mine sites, the number of outsiders will be far larger. (It should be remembered that Consolidation Coal Company indicated to the Northern Cheyennes that their proposed gasification complex would require 30,000 workers.) Presumably, these people will have to live on or near the reservations; the cultural and social changes associated with their arrival will be severe. These new people will need:

1. Housing, as well as recreational, shopping, religious, and other facilities. Tribal councils will have to make difficult decisions in the field of urban planning.

2. Water supply and sewage treatment. Where will the funds for these facilities come from?

3. Police, fire, and hospital protection.

4. Roads and other public facilities.

5. Educational facilities.

Local Indian ways and customs may well be trampled by the numerical superiority of outsiders and significant stresses on the tribal government structure can be expected.

G. What should be the timing, extent and institutional methods used to develop Indian coal resources? Coal development on Indian reservations may be carried on in varying degrees of intensity. Some of these options include:

1. Small-scale coal mining, to be spread out over a large number of years.

2. Very intensive, large-scale mining, leading to the quickest possible depletion of resources.

3. Large-scale mining with the coal to be converted to electricity on or near the reservation.

4. Large-scale mining with gasification complex on or near the reservation.

As the intensity of development increases, so do all the problems mentioned previously. The decision about the degree and timing of industrialization rests with the tribes, who must have access to the aforementioned data.

Various institutional arrangements, such as partnerships, joint ventures and wholly owned Indian operations are available as alternatives to the standard leasing policy. These other

business forms offer closer tribal control over mining operations, a chance to participate in the profits and thus avoid the effects of inflation, and some tax advantages. The tribes should be given competent advice by experts in financial and tax planning.

CONCLUSIONS AND RECOMMENDATIONS

The Indian tribes in the Northern Great Plains are the owners of a substantial number of natural resources. In addition, these resources exist in such large quantities so as to require their orderly and planned development to assure that the tribes and their members will continue to live in an environment which they determine to be most desirable.

Many of the tribes in the Northern Great Plains region are being asked to make major development decisions with respect to their resources without the aid of sufficient scientific data which is so necessary within the decision making process in order that all of the viable alternatives to the proposed development can be considered.

Moreover, the prior and paramount tribal rights to the use of water which arise upon, traverse or border upon their reservations are being encroached upon by the states, the federal government, and their users; that these prior and paramount rights to the use of water must be protected with skill and diligence by an aggressive effort to protect, preserve, conserve, and develop these rights to their fullest extent.

In light of the aforementioned conclusions, the Indian tribes in the Northern Great Plains make the following recommendations:

Recommendation No. 1

That the twenty-six tribes in the Northern Great Plains establish a Federation for the purpose of:

> Formulating programs that will describe and quantify the Northern Great Plains Indians' natural resources

and cultural resources.

Develop programs that will obtain sufficient scientific data necessary to make informed decisions relative to the development of Indian resources, and an understanding of the impact of such development on other resource and cultural values.

Act as the Indian representative on federal and state/federal land and water planning organizations and other cooperative federal and federal/state programs that will have direct or indirect effects on Indians and their resources.

Provide, at the request of individual tribes, assistance in developing management alternatives for their resources.

Recommendation No. 2

That the Congress of the United States recognize, authorize and appropriate monies for the Federation. And that said authorized monies be appropriated in the amount of $750,000 for the first year's operating budget with authorization for the Federation to return to request monies for operation in subsequent years. These monies would be utilized by the Federation to fulfill the goals in Recommendation No. 1 to obtain the necessary resource people to study and evaluate the tribes' natural resources and to develop a plan for the development of said resources.

Recommendation No. 3

That the President of the United States as the principal agent of Indian Rights, authorize and/or cause a moratorium on the allocation of waters by all federal agents and agencies including the Burea of Reclamation and Corps of Engineers from the various federal projects within the Northern Great Plains until such time as Indian Rights are fully recognized and protected.

Recommendation No. 4

That Indian water, air, coal and land resources should be fully recognized, protected, and that Indian resource development projects should be initiated, authorized, and funds appropriated at the request of the Indian tribes, by the Congress so that the Indian resources may be put to beneficial use for the tribes who may then receive the full economic benefit of their valuable rights.

In closing, then, the Indian tribes of the Northern Great Plains are faced with the same problems today that the Indians were facing one hundred years ago. Sitting Bull, in a speech he gave in 1875 (one year before the Battle of Little Bighorn), spoke to these very problems when he stated:

> We will yeild to our neighbors--even our animal neighbors--the same right as we claim to inhabit the land. But we now have to deal with another breed of people. They were few and weak when our forefathers first met them and now they are many and greedy. They choose to till the soil. Love of possessions is a disease with them. They would make rules to suit themselves. They have a religion which they follow when it suits them. They claim this Mother Earth of ours for their own and fence their neighbors away from them. They degrade the landscape with their buildings and their waste. They compel the natural earth to produce excessively and when it fails, they force it to take medicine to produce more. This is an evil.
>
> This new population is like a river overflowing its banks and destroying all in its path. We cannot live the way these people live and we cannot live beside them. They have little respect for Nature and they offend our ideals. Just seven years ago we signed a treaty by which the buffalo country was to be ours and unspoiled forever. Now they want it. They want the gold in it. Will we yield? They will kill me before I will give up the land that is my land.

Tribes	Treaties & Exec. Orders (Establishing Present Reserv.)	Major Treaties Effecting Northern Great Plains Tribes			
		Ft. Laramie 1851 11 Stat. 749	Ft. Laramie 868 15 Stat. 649	Ft. Bridger 1868 15 Stat. 673	Division of Great Sioux Reservation 1889 25 Stat. 888
1. Blackfeet	Treaty 10/17/1855 11 Stat. 657	X			
2. Crow	Treaty 1851 11 Stat. 749	X	See (1) Below		
3. Assiniboine	Ft. Peck 1873 Exec. Order	X			
4. Gros Ventre	Ft. Belknap 1888 Exec. Order	X			
5. Flathead	Treaty July 16, 1855 12 Stat. 975				
6. Chippewa-Cree	Cong. Act 1916 39 Stat. 739				
7. No. Cheyenne	Exec. Order 11/26/1884	X	See (2) Below		
8. Omaha	Treaty 1854 10 Stat. 1043				
9. Winnebago	Cong. Act 1865 14 Stat. 671				
10. Santee Sioux	Exec. Order 6/20/1866				X
11. Mandan	Ft. Berthold	X			
12. Hidatsa	Exec. Order	X			
13. Arikara	4/12/1870	X			
14. Devils Lake Sioux	Treaty 1867 15 Stat. 505				
15. Turtle Mountain Chippewa	Exec. Order 12/21/1882				
16. Cheyenne River Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
17. Crow Creek Sioux	Treaty 1868 15 Stat. 649	X	See (3) Below		
18. Flandreau Santee Sioux	Cong. Act 1935		X		
19. Oglala Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
20. Rosebud Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
21. Sisseton & Wahpeton Sioux	Treaty 1867 15 Stat. 505	(4) See Below	(5) See Below		
22. Standing Rock Sioux	Cong. Act 1889 25 Stat. 888				X
23. Yankton Sioux	Treaty 1858 11 Stat. 743				
24. Lower Brule Sioux	Treaty 1965 14 Stat. 699	X	X		X
25. Shoshone	Treaty 1868 15 Stat. 673			X	
26. Arapahoe	Temporarily Placed Upon Shoshone Reserv. 1878 (7) See Below	X	(6) See Below		

TABLE I.1

SIZE AND PERCENTAGE OF COAL BEARING AREAS IN

NORTHERN GREAT PLAINS STATES AND INDIAN RESERVATIONS

State	Total Area of States in Sq. Mi.	Area Underlain by Rocks Square Miles	Coal-bearing Percent
Montana	147,138	51,300	35
North Dakota	70,665	32,000	45
South Dakota	77,047	7,700	10
Wyoming	97,914	40,055	41
Total	392,764	131,055	33

Indian Reservation	Total Area of Reservation in Sq. Mi.	Area Underlain by Square Miles*	Coal-bearing Rock Percent*
Cheyenne River	2,210	442	20
Standing Rock	1,321	403	33
Blackfeet	1,472	1,030	70
Rocky Boy	170	153	90
Fort Peck	1,506	1,506	100
Fort Berthold	706	706	100
Wind River	2,932	1,173	40
Northern Cheyenne	679	679	100
Crow	2,431	1,458	60

*Areas and percentages are estimated based on best available data including N.A.S. Report and Westwide Study.

COAL:
RESERVES ON
RESERVATIONS—
ESTIMATE
NORTHERN GREAT
PLAINS
Area of Coal
Reserves
Generalized
Location of
Strippable
Reserves
Helena
Butte
Billings
Cheyenne
Rapid City
BUREAU OF MINES STUDY
1968 THRU 1988
CHEYENNE RIVER 165 MILLION
STANDING ROCK 69 MILLION
BLACKFEET 69 MILLION
ROCKSBY 127 MILLION
FLATHEAD 142 MILLION
WINDRIVER 69 MILLION
N CHEYENNE 69 MILLION
CROW 69 MILLION
TOTAL 33
BILLION TON

TABLE 3.3

Sulfur Content of
Estimated Strippable Reserves[a]
(Millions of short tons)[b]

State	Stripping[c,d] ratio	Strippable Reserves <1%S	1-2%S	>2%S	Total
Arizona	8:1	387	0	0	387
Colorado	4:1 to 10:1	476	24	0	500
Montana	2:1 to 18:1	3,176	224	0	3,400
New Mexico	8:1 to 12:1	2,474	0	0	2,474
N. Dakota	3:1 to 12:1	1,678	397	0	2,075
S. Dakota	12:1	160	0	0	160
Utah	3:1 to 8:1	6	136	8	150
Washington	10:1	135	0	0	135
Wyoming	1.5:1 to 10:1	13,377	65	529	13,971
TOTALS		21,869	846	537	23,252

Source: a. U.S. Bureau of Mines Information Circular 8531.

b. 1 short ton = 0.91 metric tons

c. Stripping ratio = thickness of overburden/thickness of coal seam.

d. Stripping ratio is also defined by some mining engineers as cubic yards of overburden per ton of coal. Sec., e.g., Surface Mining by E. P. Pfleider, American Institute of Mining, Metallurgical, and Petroleum Engineers, New York, 1968.

TABLE 4.0

STREAMFLOW FOR KEY GAGING STATIONS, MISSOURI BASIN

Gaging Station	Years of Record	Average Annual Discharge (ac ft)*
Powder R. at Arvada, Wyo.	40	196,000
Powder R. at Moorhead, Mt.	42	327,000
Tongue R. near Decker, Mt.	11	358,000
Tongue R. at Miles City, Mt.	28	302,000
Bighorn R. at Bighorn, Mt.	26	2,760,000
Yellowstone R. at Miles City, Mt.	44	8,150,000

* 1 ac ft = 0.125 hectare-m

ATTACHMENT 1

DECLARATION OF INDIAN RIGHTS TO THE NATURAL RESOURCES IN THE NORTHERN GREAT PLAINS STATES

Prepared by:

Member Tribes in the
Native American Natural
Resources Development Federation
of the Northern Great Plains

In conjunction with:

Native American Rights Fund
Bureau of Indian Affairs
&
Private Consultants

June, 1974

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I. DECLARATION OF INDIAN RIGHTS TO THE NATURAL RESOURCES IN THE NORTHERN GREAT PLAINS STATES.

The Indian tribes and people of the Northern Great Plains being confronted with an all pervasive crisis threatening the present and future uses of their natural resources, including but not limited to their land, right to use of water and their ~~coal~~ Natural Resources, do hereby declare as follows:

The Northern Great Plains area of the United States is presently attracting international attention due to the energy crisis which makes the vast coal resources of this area very appealing for immediate development. The development of this coal and the concomitant use of water, air, and other natural resources threatens the viability of our environment and the continued existence of the twenty-six tribes which occupy the Northern Great Plains within the states of Montana, Wyoming, North Dakota, and ~~Nebraska~~ South Dakota.

These tribes would be severely burdened with immense consequences resulting from any natural resource development. It is for this reason that these tribes desire to submit the following declaration for inclusion in the report of the Northern Great Plains Resource Program. The tribes have been asked to participate in numerous work group statements on this matter, but it is readily apparent that the major impact upon the survival of these Indian tribes will be foisted upon the erosion of their water rights and the depletion of water resources due to the need for massive quantities of water to develop the coal. The Indian water rights here involved, then, are like

the Indian fishing rights considered by the United States Supreme Court in United States v. Winans, 198 U.S. 371, 381 (1905); they are "not much less necessary to the existence of the Indians than the atmosphere they breathe."

The Indian tribes of the five states do hereby give notice to the world that they will maintain their ownership to the priceless natural resources which are geographically and legally related to their reservations. Indian tribes and people, both jointly and severally, have declared and the courts have sustained that the American Indian tribes of the Northern Great Plains have the prior and paramount rights to the waters of all rivers, streams, or other bodies of water, including all tributaries thereto, which flow through, arise upon, underlie or border upon their reservations. These prior and paramount rights would extend to all waters that may now or in the future be artificially augmented or created by weather modification, by desalination of presently unusable water supplies, by production of water supplies as a byproduct of geothermal power development, or by any other scientific or other type of means within the respective reservations in the Northern Great Plains area.

In view of the tribes' prior and paramount rights to all the waters to which they are geographically related, it is self-evident that any major diversion of said waters for any purpose would constitute an encroachment upon Indian water rights. All federal agents or agencies, including but not limited to the Bureau of Reclamation, Corps of Engineers, states, persons, parties or organizations are, therefore, put on notice

that any diversion or use of such tribal waters shall be at their own risk.

LEGAL BASIS FOR INDIAN WATER RIGHTS

The Indians' prior and paramount rights were sustained in the United States Supreme Court case familiarly known as the "Winters Doctrine", Winters v. United States, 207 U.S. 564 (1908). The Court held in that case that the right to use of water from the Milk River, in the State of Montana, which bordered upon the Fort Belknap Indian Reservation was reserved by the government in the treaty for the benefit of the Indians of that reservation.

The Winters Doctrine embraces reservation rights whether created by treaty, statute or executive order, before or after statehood.

- U.S. v. Walker River Irrig. Dist., 104 F.2d 334 (1939)
- Ariz. v. Cal., 373 U.S. 546 (1963)

The waters reserved are exempt from appropriation by non-Indians pursuant to state law.

- Winters v. U.S., supra
- U.S. v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956)

The courts have consistently held that the nature of the right was such that sufficient water was reserved for the present and future needs of the Indians, whatever the use and without limit.

- Ariz. v. Cal., supra

It is the definition of the purpose of each reservation that requires careful consideration. The language of the various

treaties speaks in terms of providing a permanent home or place to live, free from encroachment by the non-Indian.

- See Treaty of Fort Bridger, July 3, 1858 (15 Stat. 643)

Although the fundamental rules of Indian treaty construction have been variously stated, there are essentially three well defined and well established rules.

The first fundamental rule is that "treaties with Indians must be interpreted as they would have understood them."

- Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970)
- Jones v. Meehan, 175 U.S. 1, 10-11 (1899)
- United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938)
- United States v. Winans, supra

A second rule of Indian treaty construction is that doubtful expressions are to be resolved in favor of the Indian parties to the treaty.

- McClanahan v. State Tax Comm'n of Arizona, _____ U.S. _____, 36 L.Ed.2d 129, 137 (1973)
- Carpenter v. Shaw, 280 U.S. 363, 367 (1930)
- Standing Rock Sioux Tribe v. United States, 182 Ct. Cl. 813 (1963)

A third important canon of Indian treaty construction is that Indian treaties are to be constructed in favor of the Indians.

- Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-432 (1943)
- Tulee v. Washington, 315 U.S. 681, 684-685 (1942)

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- United States v. Shoshone Tribe, supra

Executive order reservations are no different than treaty reservations when dealing with the question of Indian water rights.

- Ariz. v. Cal., supra

- U.S. v. Walker Irrig. Dist., supra

Language in a federal statute affecting the rights of Indians is to be construed in the same manner as is language in treaties with Indians.

- Squire v. Capoeman, 351 U.S. 1, 6 (1956)

HISTORICAL AND CONSTITUTIONAL BASIS OF INDIAN WATER RIGHTS

It is essential that any consideration of the nature of the Indians' rights to the use of water be based upon their inherent sovereign power of self-government.

Indian tribes from time immemorial had the right to use the water in the streams in the area wherever they made their homes; they had the right to use the lands to hunt and fish. Indian lives generally were oriented to the rivers which made habitation and survival possible in contrast to the arid lands which extended for miles on each side of their ancient homes. Title to these valuable property rights has always been to the Indians and we hold that these rights to the use of water are still those of the Indian peoples. The Indian tribes hold that (See Attachment No. 1) they retained title to all that they did not cede or give up, including the invaluable rights to the use of water in the streams and rivers which arise, border, traverse, or underlie their lands and which were retained by them when their reservations were established. These rights are to be treated as private in character and not as federally reserved rights to the use of water owned by the public as a whole.

These IMMEMORIAL RIGHTS are protected by the United States Constitution. The Supremacy Clause proclaims, "The Constitution and the laws of the United States which shall be made in pursuance thereof; and all TREATIES made, or which shall be made, under authority of the United States, shall be the supreme law of the land." The COMMERCE CLAUSE provides

that the Congress has the authority "to regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes."

Water rights of the Indians were not given up or ceded in any treaties and the United States Supreme Court enunciated this fact in the case of Winters v. United States in 1908, as above stated. Today, more than ever, the Indian finds himself in a life and death competition for a water supply rapidly becoming inadequate to meet all demands. The biggest problem facing them as Indian people today is the need to determine the extent of the rights or in practical words, the amount of water they have a right to use.

The tribes understand that they will be able to promulgate water codes and under authority from the Secretary of Interior, they will be able to regulate and distribute waters among the people on the various reservations. This will give them a counterpart to the state procedures for filing of water rights and uses and will keep the states from trying to regulate their waters.

Historically, non-Indian users of water have made investments utilizing water in complete disregard to the prior and paramount rights of the Indian tribes. Many examples prove that local and state interests have encouraged the development of water resources even though the supply was subject to Indian rights, choosing to ignore those superior rights in hopes that Congress, at some future date, would "buy out" the Indians as has been somewhat of an unofficial policy in the constant erosion of Indian property, land, minerals, and water. The Indian tribes

cannot afford to be "put off", "bought off" or "turned off" any longer in dealings pertaining to their valuable resources.

II. PRINCIPLES FOR PLANNING THE DEVELOPMENT OF INDIAN WATER, LAND AND MINERAL RESOURCES

There is no question regarding the need for thorough evaluation of the extent in value (including social and cultural values) of Indian natural resources on the Northern Great Plains and areas draining the lands and reservations of each of the twenty-six Indian tribes concerned. At stake is the future economic development and well-being of Native Americans residing on Indian reservations in Montana, Wyoming, North Dakota, South Dakota, and Nebraska. Adequate methods for evaluating the feasibility, economics, or desirability of the development of Indian water, land, and mineral resources have been sorely lacking for several decades.

On October 30, 1973, new "Principles and Standards for Planning Water and Related Land Resources" were promulgated as federal law by the U.S. Water Resources Council[1/] which clearly require of the trustee a rigorous analysis of natural development programs including equal detail for all resource development alternatives. The principles were established for planning the use of water and land resources of the United States, including Indian reservations, to achieve objectives determined cooperatively through the coordinated actions of federal, state, and local governments, (including Indian tribes and individuals) private enterprise, organizations, and individuals.

1/ Published in the Federal Register, September 10, 1973, Volume 38, No. 174, Part III, Enacted October 30, 1973

They provide the basis for federal participation; including federal cooperation with Indian tribes, with river basin commissions, states, and others in the preparation, formulation, evaluation, review, revision, and transmittal to the Congress for natural resource development plans and programs. The plans and programs include those affecting states, regions, Indian tribes, and river basins for planning of federal and federally assisted water and related land resource programs and projects and certain federal licensing activities.

The overall purpose of water and land resource planning is to promote the quality of life by reflecting societies' preference (including Indian country) for attainment of the objectives defined below:

a. To enhance national economic development by increasing the value of the nation's output of goods and services and improving national economic efficiency.

b. To enhance the quality of the environment by the management, conservation, preservation, creation, restoration or improvement of the quality of certain natural and cultural resources and ecological systems.

The principles and standards establish a system of accounts which will display both beneficial and adverse effects of each natural resource plan and each alternative to that plan and will compare the benefits between regional development, social well-being, and environmental effects. The display of beneficial and adverse effects will be prepared and presented in such a manner that different levels of achievement and/or development in each account can be readily discerned and compared by the

public and all interested parties clearly indicating the trade-offs among alternative plans.

For purposes of accounting a clear conveyance of information to the public, the distribution of beneficial and adverse effects will be shown to whomever they accrue (specifically to the recipient of the project benefits). This will include display of the distribution of both beneficial and adverse effects to regions, income classes, and interest groups relevant to the particular plans and will reflect not only economic costs but social, cultural and environmental effects as well. The system of accounts will also display the beneficial and adverse effects of a particular project in relation to the rest of the nation.

The Water Resources Council will establish procedures for relating regional accounts to the rest of the nation. These procedures, however, have not yet been developed, but are presently being drafted. The use of such reporting regions will not, however, rule out the use of other regions whose delineations are important (especially Indian reservations) in measuring beneficial or adverse effects on regional developments.

This is an extremely important aspect of the principles and standards as they affect Indian natural resource development projects. That is, the principles and standards can be used on a regional basis with the Indian reservation being a designated region, rather than an entire river basin, state or other large geographic entity that would dilute the actual benefits or the adverse effects on Indian people on a given reservation.

The evaluation, systematic display, and comparison of

alternative plans for a project affecting a state, Indian tribe, region, or river basin will provide the basis for selecting a plan best suited for those parties most heavily impacted. It is important to recognize that the selection of a plan is ultimately made by policy-makers and not by administrators or technicians. These new methods, however, provide better decision-making tools and information for the policy-makers in rendering their decision.

The Water Resources Council implemented the principles by establishing standards for planning water and land resources in accordance with the Water Resources Planning Act (P.L. 89-80). The standards were implemented and published at the same time as were the principles.

The effect of the principles and standards for planning for Indian water and land resources is that they must be used by river basin commissions, federal-state organizations, and each of the federal departments and agencies. In addition, the Office of Management and Budget, the Council on Environmental Quality, and other organizations in the executive office of the President must use these principles and standards in their review of proposed project, basin, or regional plans, including those affecting Indian natural resources whether on or off the reservation. It is interesting to note that the Chairman of the United States Water Resources Council is the Secretary of the Interior -- the trustee of Indian people.

The foregoing principles, standards, and procedures must be used with diligence and caution by Indian leadership.

There is little question that they provide a powerful tool or weapon with which Indian tribes can demand of the trustee rigorous forthright analysis of any project. However, as with any tool or weapon, it can be rustled from the user and used against him. In other words, the principles have the potential of being a two-edged sword: for requiring methods for detailed analysis of projects which are beyond financial ability of the tribes to accomplish. Therefore, we require that the cost of project analysis be paid in full by the trustee.

An additional caution is that the principles and standards are only as good as the information used to address them; as with the computer or any accounting technique -- if you put garbage in you can only get garbage out. We, therefore, demand of the trustee, other federal agencies, states, local governments, and other parties, that the principles be addressed not only rigorously, but with candor and factual information.

The need for the foregoing principles and standards especially for evaluation of natural resource development programs in Indian country was clearly stated in the recently released National Academy of Sciences/National Academy of Engineering "Report to the Energy Policy Committee of the Ford Foundation", regarding land use, surface ownership, and mineral ownership:

Land Use, Surface Ownership, and Mineral Ownership

> "The questions of land, surface and mineral ownership in the coal areas are complex and in many cases still unresolved. The federal government controls much of the surface and even larger fraction of the minerals. Indian nations also claim ownership of large areas, sometimes in conflict with other private claimants and the federal government.

> In addition, the individual states hold significant tracts, as do the railroad companies. The ownership pattern varies, but the checkerboard is common over much of the area. No reliable statistics have been compiled for either surface or mineral ownership .... Although leasing of federally owned coal deposits has been suspended since 1970, leasing of coal lands and other ownerships has continued. In Montana alone, more than 600,000 acres are currently held in coal leases, although only a fraction of those are suitable for strippable deposits."

Filling the foregoing lack of information identified by the NAS and NAE Report is the focal point and objective of the Northern Great Plains Resources Program. The NGPRP study covers the five states of Montana, Wyoming, North and South Dakota, and Nebraska, and is being coordinated by the United States Department of Interior.

These new methods apply not only to water resource developments, but to related land resources, including mineral developments in which the federal government has a stake in monetary terms or as trustee.

The Northern Great Plains Resources Program, in cooperation with the Indian tribes, must identify not only short-term opportunities for natural resource management in Indian country, but must address the problems of natural resource management for future generations of Indian tribes and Indian people.

III. ISSUES TO BE ADDRESSED BY THE TRIBES OF THE NORTHERN GREAT PLAINS PRIOR TO DETERMINING THE EXTENT OF DEVELOPMENT OF THEIR MATERIAL RESOURCES

The vast natural resources located on or near Indian reservations in the Northern Great Plains offer a potential for significant economic development. Development will also present some major problems for the Indian people in the area. In order to make intelligent choices as to the nature and extent to which the development of their natural resources, including coal, water and air should take place, the tribes must have before them complete information on the nature and value of their coal, water and land resources, together with the political, cultural, economic and environmental effects development will bring. This data must be made available before development takes place, so that effective planning is possible. In the following sections, it is demonstrated, using the little data which is available, the enormous size of the resources and the potential problems which accompany the use of these resources. It is emphasized that huge information gaps remain; it is the duty of the federal government in carrying out its trust responsibility to the Indian people residing on the reservations to gather this data and supply it to the Indian people who will be affected.

The National Water Commission, in its final report to the President, recommended:

> At the request of any Indian Tribe, the Secretary of the Interior or such other Federal officer as the Congress may designate should conduct

> studies in cooperation with the Indian Tribes of the water resources, the other natural resources, and the human resources available to its reservation. An object of the studies should be to define and quantify Indian water rights in order to develop a general plan for the use of these rights in conjunction with other tribal resources . . . . Congress should appropriate funds to support the studies . . . . (Recommendation 14-1.)

This recommendation should be carried out immediately with respect to the twenty-six Indian tribes in the Northern Great Plains.

In considering the development issue, the following questions need to be answered:

A. How much Indian land will be affected by coal development operations? Figure 1.1 is a map showing the location of strippable coal reserves in the Northern Great Plains compared to the areas of strippable coal reserves on Indian reservations in the five states comprising the Northern Great Plains. Table 1.1 shows that a large proportion of the five Northern Great Plains states is underlain by coal deposits. It can be seen that substantial portions of nine Indian reservations[2/] within those states have significant coal resources. Indeed, three of the reservations are entirely underlain by coal-bearing rock. Thus, if coal reserves on these reservations were developed to the fullest extent possible, the land base of those tribes

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2/ Cheyenne River, Standing Rock, Blackfeet, Rocky Boys, Fort Peck, Fort Berthold, Wind River, Northern Cheyenne, and Crow.

could be seriously eroded, or even destroyed. As we note in Table 1.1 the data on coal under Indian lands is very incomplete and the estimates offered are highly speculative.

B. How much Indian coal can be recovered economically?

The Bureau of Mines has estimated that the nine reservations contain 36 billion tons of coal. However, this figure is misleading. Much of the total coal reserve cannot be recovered by any of the mining techniques known today. Another type of figure frequently cited to show coal reserves, the recoverable reserve, is also irrelevant in the Northern Great Plains. This figure includes all coal that can be recovered by present technology through underground or surface mining. However, in the Northern Great Plains, where there are huge reserves of strippable coal in competition with coal on Indian lands, it is questionable that coal recoverable only by underground mining will be exploited in the near future.

Furthermore, the great extent of coal reserves now classified as mineable by underground methods may, in the future, become strippable through technological, economic, and/or legislation pending in Congress.

The key figure, then, is the strippable reserve. Although approximate figures are available on a state-wide basis, the strippable reserves for the nine coal-rich Northern Great Plains reservations are unknown.

Once again, crucial data necessary for intelligent decision making is unavailable to the Indians. We do know that we are talking about huge amounts of strippable coal. For example,

the mid-April 1973 edition of Coal Age (page 117) reports that there are eight billion tons of strippable coal on the Crow and Northern Cheyenne Reservations. (The fact that this information must be obtained from a trade publication graphically illustrates the government's failure to provide meaningful information and guidance to the Indians of the Northern Great Plains.)

A second factor in determining the value of coal resources, aside from the quantity of coal available, is its quality. In particular, the sulfur content and heat rating of the coal are important. This information is usually made available to the tribes only after a coal prospecting permittee has completed its exploration and is ready to invoke its preference right to lease selected portions of the permit area. By then, of course, the tribes are unable to seek an adjustment of the royalty to reflect favorable data, since the royalty and bonus payments have been irrevocably fixed under the terms of the contract. Needed immediately are new procedures for exploration, production, and development leases on Indian lands.

A third variable in the value of the coal resource is the cost associated with production. One of the most important variables in production cost is the stripping ratio; the thickness of the overburden covering the coal compared to the thickness of the coal seam. The lower the stripping ratio; the less it costs to mine. Stripping ratios of 16:1 and higher are commonly encountered at eastern and mid-western strip mines, while stripping ratios of up to 12 to 1 are common in many

of the western states (see Table 3.3 of the N.A.S. Report)[3/] It appears that the stripping ratio for Indian coal in the Northern Great Plains is more favorable than average. For example, the stripping ratio for one tract of coal land owned by the Crow Tribe in the ceded portion of their reservation averages between 3.5 and 4:1.

Another important factor in determining the value of the Indian coal resources includes the present and future market for comparable quality coal, freight rates, and a survey of royalties paid to other coal owners.

C. How much water will be needed to mine and convert these coal resources? Table 4.1, attached, of the N.A.S. Report, shows the gross amount of water available in several key streams in the Northern Great Plains. (This total is subject to depletion for irrigation, industrial and municipal uses, as well as evaporation.) These depletions may substantially reduce the amount of water actually available -- estimates are that only 241,000 acre-feet are available from the Tongue River and 287,300 acre-feet from the Powder River. (See N.A.S. Report 59.)

Although it appears that there is a huge quantity of water available for coal development, in fact, the large energy companies have already applied for most of this available water. According to the newsletter of the Northern Great Plains Resources Council (February, 1974), energy companies have already filed

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3/ National Academy of Sciences, "Rehabilitation Potential of Western Coal Lands," a report to the Energy Policy Project of the Ford Foundation (Washington, D.C., 1973).

state appropriation, appropriation applications and applications and requests with the Bureau of Reclamation in the following amounts:

River	Total Appropriations, Options, and Requests
Powder	336,375
Tongue	225,175
Bighorn	2,193,000
Yellowstone	824,250
TOTAL	3,588,800

The above total is three times the highest quantity of water required in the NGPRP forecast for the entire region.

In the following paragraphs, we discuss water usage associated with various facets of the coal mining, processing, and conversion that may well take place in the Northern Great Plains.

1. Mining.

According to the N.A.S. Report (page 63), actual mining operations require very little water, most of which can be obtained readily from shallow wells. Nonetheless, the drilling of such wells could lower the water table in local areas.

2. Surface Mine Rehabilitation.

The N.A.S. Report (pp. 6465) indicates that supplemental irrigation is essential in most areas, if revegetation is to succeed. The report states that from .50 to .75 acre-feet per acre will be required for this purpose annually. However, every rehabilitation

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study to date concludes that rehabilitation plans on the Northern Great Plains, which are dependent on supplemental irrigation, are both ecologically and economically unsound. In other words, there is a real question of whether these areas should be disturbed at all, since there is no guarantee that these lands can ever be rehabilitated.

3. Coal Conversion.

The N.A.S. Report (page 160) indicates that one 1,000 megawatt electric generating station, using an evaporative tower for cooling and operating at full capacity requires 20,000 acre-feet of cooling water annually. For a similar plant using a cooling pond, instead, the requirement drops to 12,000 acre feet per year; and to only 2,000 acre-feet per year if a dry cooling tower is used. None of the utilities in the Northern Great Plains are planning to use this more expensive cooling method, despite the huge water saving that could be achieved. Since the North Central Power Study indicates that up to 50,000 megawatts of electric generating capacity could ultimately be constructed in the Northern Great Plains, cooling water requirements could conceivably rise as high as one million acre-feet. (The North Central Power Study (Vol. I, p. 16) contains a somewhat smaller estimate -- 655,000 acre-feet per year.)

A plant producing 250 million cubic feet a

day of synthetic natural gas from coal would require approximately 30,000 acre-feet of water per year. (In 1972, Consolidation Coal Company proposed a complex of four such plants on the Northern Cheyenne Reservation.) A coal liquefaction process, whereby synthetic crude oil is extracted from coal, is now being developed. A plant producing 100,000 barrels per day would consume approximately 65,250 acre-feet of water per year. N.A.S. Report, p. 160.

D. How will land resources be affected? The coal mining and conversion process uses up another valuable Indian resource -- land. In many areas, where rainfall is very sparse, or reclamation efforts are minimal, strip-mined lands may be irretrievably lost for other uses, such as grazing, housing, etc. Even if reclamation is successful, much of the land to be strip-mined and all land needed for conversion facilities, transmission lines, roadways, and other rights-of-way, will be lost for the life of the mining/conversion operation -- often more than a quarter of a century. The areas subject to potential damage from strip mining are significant. According to the N.A.S. Report (Table 3.5) between 1965 and 1972, Montana coal mining operations disturbed 46 acres per million tons of coal mined. At that rate, mining the 8 billion tons of strippable coal on the Crow and Northern Cheyenne Reservations would consume 368,000 acres, 18% of the total area of the two reservations.

E. What will be the major environmental effects?

1. The major environmental impacts of strip mining

and coal conversion include:

a.) Pollution of ground and surface waters.

b.) Deposition of salts and toxic minerals, which render large areas permanently infertile.

c.) Disruption of aquifers and aquifer recharge areas, this may result in dry wells, lowered water tables, increased erosion, and flood damage.

d.) Air pollution associated with the dust from mining. If a conversion process, such as gasification or electric power production is involved, there will be air pollution from particulate matter, sulfur oxides, nitrogen oxides, radioactivity, and trace metals. In addition, there will be large amounts of sulfate sludge and flyash produced by air pollution abatement devices that must be disposed of.

e.) Associated with strip mines and coal conversions are a network of roads, power transmissions lines, slurry pipelines, and railroads, which cause pollution from dust and erosion, as well as visual pollution.

If there is to be any hope of adequate reclamation of strip mined areas, the planning process must begin well before actual mining. Data that must be gathered includes:

a.) Climatological and meteorological data.

b.) Indigenous plants and animals.

c.) Thorough analysis of the physical and chemical components of soil overburden.

d.) Description of groundwater supplies, flows and uses.

e.) The location and nature of unusual scenic, historical, archeological, and cultural values in the area to be mined.

2. Competent experts will be needed to interpret this data, to help formulate a mining and reclamation plan, and to make sure the plan is enforced. These experts must be capable of explaining the data and resulting options in non-technical terms so that tribal members can understand all alternatives before making decisions.

F. What will be the social and cultural effects?

Mining operations will bring a large influx of outside workers, technicians, and managers onto the reservations. If coal conversion facilities are located near the mine sites, the number of outsiders will be far larger. (It should be remembered that Consolidation Coal Company indicated to the Northern Cheyennes that their proposed gasification complex would require 30,000 workers.) Presumably, these people will have to live on or near the reservations; the cultural and social changes associated with their arrival will be severe. These new people will need:

1. Housing, as well as recreational, shopping, religious, and other facilities. Tribal councils will have to make difficult decisions in the field of urban planning.

2. Water supply and sewage treatment. Where will the funds for these facilities come from?

3. Police, fire, and hospital protection.

4. Roads and other public facilities.

5. Educational facilities.

Local Indian ways and customs may well be trampled by the numerical superiority of outsiders and significant stresses on the tribal government structure can be expected.

G. What should be the timing, extent and institutional methods used to develop Indian coal resources? Coal development on Indian reservations may be carried on in varying degrees of intensity. Some of these options include:

1. Small-scale coal mining, to be spread out over a large number of years.

2. Very intensive, large-scale mining, leading to the quickest possible depletion of resources.

3. Large-scale mining with the coal to be converted to electricity on or near the reservation.

4. Large-scale mining with gasification complex on or near the reservation.

As the intensity of development increases, so do all the problems mentioned previously. The decision about the degree and timing of industrialization rests with the tribes, who must have access to the aforementioned data.

Various institutional arrangements, such as partnerships, joint ventures and wholly owned Indian operations are available as alternatives to the standard leasing policy. These other

business forms offer closer tribal control over mining operations, a chance to participate in the profits and thus avoid the effects of inflation, and some tax advantages. The tribes should be given competent advice by experts in financial and tax planning.

IV. CONCLUSIONS AND RECOMMENDATIONS

The Indian tribes in the Northern Great Plains are the owners of a substantial number of natural resources. In addition, these resources exist in such large quantities so as to require their orderly and planned development to assure that the tribes and their members will continue to live in an environment which they determine to be most desirable.

Many of the tribes in the Northern Great Plains region are being asked to make major development decisions with respect to their resources without the aid of sufficient scientific data which is so necessary within the decision making process in order that all of the viable alternatives to the proposed development can be considered.

Moreover, the prior and paramount tribal rights to the use of water which arise upon, traverse or border upon their reservations are being encroached upon by the states, the federal government, and their users; that these prior and paramount rights to the use of water must be protected with skill and diligence by an aggressive effort to protect, preserve, conserve, and develop these rights to their fullest extent.

In light of the aforementioned conclusions, the Indian tribes in the Northern Great Plains make the following recommendations:

Recommendation No. 1

That the twenty-six tribes in the Northern Great Plains establish a Federation for the purpose of:

> Formulating programs that will describe and quantify the Northern Great Plains Indians' natural resources

and cultural resources.

Develop programs that will obtain sufficient scientific data necessary to make informed decisions relative to the development of Indian resources, and an understanding of the impact of such development on other resource and cultural values.

Act as the Indian representative on federal and state/federal land and water planning organizations and other cooperative federal and federal/state programs that will have direct or indirect effects on Indians and their resources.

Provide, at the request of individual tribes, assistance in developing management alternatives for their resources.

Recommendation No. 2

That the Congress of the United States recognize, authorize and appropriate monies for the Federation. And that said authorized monies be appropriated in the amount of $750,000 for the first year's operating budget with authorization for the Federation to return to request monies for operation in subsequent years. These monies would be utilized by the Federation to fulfill the goals in Recommendation No. 1 to obtain the necessary resource people to study and evaluate the tribes' natural resources and to develop a plan for the development of said resources.

Recommendation No. 3

That the President of the United States as the principal agent of Indian Rights, authorize and/or cause a moratorium on the allocation of waters by all federal agents and agencies including the Bureau of Reclamation and Corps of Engineers from the various federal projects within the Northern Great Plains until such time as Indian Rights are fully recognized and protected.

Recommendation No. 4

That Indian water, air, coal and land resources should be fully recognized, protected, and that Indian resource development projects should be initiated, authorized, and funds appropriated at the request of the Indian tribes, by the Congress so that the Indian resources may be put to beneficial use for the tribes who may then receive the full economic benefit of their valuable rights.

In closing, then, the Indian tribes of the Northern Great Plains are faced with the same problems today that the Indians were facing one hundred years ago. Sitting Bull, in a speech he gave in 1875 (one year before the Battle of Little Bighorn), spoke to these very problems when he stated:

> We will yield to our neighbors--even our animal neighbors--the same right as we claim to inhabit the land. But we now have to deal with another breed of people. They were few and weak when our forefathers first met them and now they are many and greedy. They choose to till the soil. Love of possessions is a disease with them. They would make rules to suit themselves. They have a religion which they follow when it suits them. They claim this Mother Earth of ours for their own and fence their neighbors away from them. They degrade the landscape with their buildings and their waste. They compel the natural earth to produce excessively and when it fails, they force it to take medicine to produce more. This is an evil.
>
> This new population is like a river overflowing its banks and destroying all in its path. We cannot live the way these people live and we cannot live beside them. They have little respect for Nature and they offend our ideals. Just seven years ago we signed a treaty by which the buffalo country was to be ours and unspoiled forever. Now they want it. They want the gold in it. Will we yield? They will kill me before I will give up the land that is my land.

The Indian tribes of the Northern Great Plains and their leaders of today will not yield. They will fight to protect, preserve and conserve the resources which their forefathers gave their lives to retain.

Tribes	Orders (Establishing Present Reserv.)	Major Treaties Affecting Northern Great Plains Tribes			
		Ft. Laramie 1851 11 Stat. 749	Ft. Laramie 868 15 Stat. 649	Ft. Bridger 1868 15 Stat. 673	Division of Great Sioux Reservation 1889 25 Stat. 888
Blackfeet	Treaty 10/17/1855 11 Stat. 657	X			
Crow	Treaty 1851 11 Stat. 749	X	See (1) Below		
Assiniboine	Ft. Peck 1873 Exec. Order	X			
Gros Ventre	Ft. Belknap 1888 Exec. Order	X			
Flathead	Treaty July 16, 1855 12 Stat. 975				
Chippewa-Cree	Cong. Act 1916 39 Stat. 739				
No. Cheyenne	Exec. Order 11/26/1884	X	See (2) Below		
Omaha	Treaty 1854 10 Stat. 1043				
Winnebago	Cong. Act 1865 14 Stat. 671				
Santee Sioux	Exec. Order 6/20/1866				X
Mandan (Hidatsa (Arikara (	Ft. Berthold	X			
	Exec. Order	X			
	4/12/1870	X			
Devils Lake Sioux	Treaty 1867 15 Stat. 505				
Turtle Mountain Chippewa	Exec. Order 12/21/1892				
Cheyenne River Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
Crow Creek Sioux	Treaty 1868 15 Stat. 649	X	See (3) Below		
Flandreau Santee Sioux	Cong. Act 1935		X		
Oglala Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
Rosebud Sioux	Cong. Act 1889 25 Stat. 888	X	X		X
Sisseton & Wahpeton Sioux	Treaty 1867 15 Stat. 505	(4) See Below	(5) See Below		
Standing Rock Sioux	Cong. Act 1889 25 Stat. 888				X
Yankton Sioux	Treaty 1858 11 Stat. 743				
Lower Brule Sioux	Treaty 1965 14 Stat. 699	X	X		X
Shoshone	Treaty 1868 15 Stat. 673			X	
Arapahoe	Temporarily Placed Upon Shoshone Reserv. 1878 (7) See Below	X	(6) See Below		

TABLE 1.1

SIZE AND PERCENTAGE OF COAL-BEARING AREAS IN

NORTHERN GREAT PLAINS STATES AND INDIAN RESERVATIONS

State	Total Area of States in Sq. Mi.	Area Underlain by Rocks Square Miles	Coal-bearing Percent
Montana	147,138	51,300	35
North Dakota	70,665	32,000	45
South Dakota	77,047	7,700	10
Wyoming	97,914	40,055	41
Total	392,764	131,055	33

Indian Reservation	Total Area of Reservation in Sq. Mi.	Area Underlain by Coal-bearing Rocks Square Miles*	Coal-bearing Rock Percent*
Cheyenne River	2,210	442	20
Standing Rock	1,321	403	33
Blackfeet	1,472	1,030	70
Rocky Boy	170	153	90
Fort Peck	1,506	1,506	100
Fort Berthold	706	706	100
Wind River	2,932	1,173	40
Northern Cheyenne	679	679	100
Crow	2,431	1,458	60

*Areas and percentages are estimated based on best available data including N.A.S. Report and Westwide Study.

COAL
RESERVES ON
RESERVATIONS—
ESTIMATE
NORTHERN GREAT
PLAINS
Area of Coal
Reserves
Generalized
Location of
Significant
Reserves
Helena
Butte
Rapid City
Cheyenne
BUREAU OF MINES STUDY
1975 PRELIMS
CHEYENNE RIVER
STANDING ROCK
ROSEBUD
PINE RIDGE
FT. BERTHOLD
WHITE EARTH
N.C. PLAINS
TOTAL 33
BILLION TONS

TABLE 3.3

Sulfur Content of
Estimated Strippable Reserves[a]
(Millions of short tons)[b]

State	Stripping[c,d] ratio	Strippable Reserves <1%S	1-2%S	>2%S	Total
Arizona	8:1	387	0	0	387
Colorado	4:1 to 10:1	476	24	0	500
Montana	2:1 to 18:1	3,176	224	0	3,400
New Mexico	8:1 to 12:1	2,474	0	0	2,474
N. Dakota	3:1 to 12:1	1,678	397	0	2,075
S. Dakota	12:1	160	0	0	160
Utah	3:1 to 8:1	6	136	8	150
Washington	10:1	135	0	0	135
Wyoming	1.5:1 to 10:1	13,377	65	529	13,971
TOTALS		21,869	846	537	23,252

Source: a. U.S. Bureau of Mines Information Circular 8531.

b. 1 short ton = 0.91 metric tons

c. Stripping ratio = thickness of overburden/thickness of coal seam.

d. Stripping ratio is also defined by some mining engineers as cubic yards of overburden per ton of coal. Sec., e.g., Surface Mining by E. P. Pfleider, American Institute of Mining, Metallurgical, and Petroleum Engineers, New York, 1968.

TABLE 4.0

STREAMFLOW FOR KEY GAGING STATIONS, MISSOURI BASIN

Gaging Station	Years of Record	Average Annual Discharge (ac ft)*
Powder R. at Arvada, Wyo.	40	196,000
Powder R. at Moorhead, Mt.	42	327,000
Tongue R. near Decker, Mt.	11	358,000
Tongue R. at Miles City, Mt.	28	302,000
Bighorn R. at Bighorn, Mt.	26	2,760,000
Yellowstone R. at Miles City, Mt.	44	8,150,000

* 1 ac ft = 0.125 hectare-m

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ATTACHMENT 2

WATER FOR INDUSTRY IN THE UPPER MISSOURI RIVER BASIN

A REPORT PREPARED FOR THE ENVIRONMENTAL
POLICY INSTITUTE ENERGY INFORMATION PROJECT
BY BOB ALVAREZ 3 April 1976

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INTRODUCTION

This paper presents a general picture of the industrial development plans being advanced by the Federal government, and private industry; and their relation to the use of Upper Missouri water. The mineral resources work group of the Northern Great Plains Resource Program (Department of Interior and State Planning Agencies) predicts that coal production in the Upper Missouri Basin will increase rapidly from less than 20 million tons in 1972 to nearly 90 million tons by 1980.[1] Although coal presently being mined in this region is being shipped to eastern and mid-western markets, future plans call for large increases in mine-mouth generation of power as well as coal liquification and gasification. What is not mentioned is that oil shale development, iron ore extraction, steel production, uranium mining and milling, not to mention nuclear power plants, and industrial "parks" producing nitrogen fertilizer, methanol and synthetic diesel fuel are also part of the picture. In part, these projects represent a major industrial reorganization of the United States based on western resources. The Upper Missouri Basin region sits atop the largest chunk.

These dramatic increases in raw material production will depend on their rate of conversion into electricity, fuel, and fabricated metal. In turn, their conversion rate will ultimately depend on water availability. For example, the type of gasification plant being proposed by Panhandle Eastern near Douglas, Wyoming will require about 7.5 million tons of coal per year and will gulp 2.8 million gallons of non-recoverable water, and 21 million gallons of reusable water for its cooling system yearly.[2] In the Black Hills of South Dakota, Pittsburgh Pacific, a subsidiary of Inland Steel, proposes to stripmine one million tons of taconite iron ore and convert it to iron ore or steel in Rapid City. This project is expected to gulp around 20,000 acrefeet of water from the Madison ground water formation if mainstem Missouri water isn't diverted to augment the scarce water supply in that area. Water is basic to every natural and man-made raw material conversion process into energy. The impact of industrial water use in the Upper Missouri River Basin, upon the established agriculture economy of this region is just beginning to be discussed by the Federal government. This paper is a start towards such an analysis.

WATER SITUATION

Water is a scarce commodity in the Northern Great Plains despite the massive dams all along the Upper Missouri and its tributaries. The average rainfall in the NGP is between 10-14 inches yearly. Cyclical droughts lower river flows on the average of once every ten years and possibly as often as one year in four in the Yellowstone sub-basin of the Upper Missouri. In order to meet energy requirements in the next 30 years, the Bureau of Reclamation states in their Montana/Wyoming Aqueduct study that 2.6 million acrefeet will be needed annually.[3] This amount will lower the Yellowstone River, a major tributary of the Upper Missouri, by one third. Energy companies have already applied for 3.3 million acrefeet.[4] If past practices are followed, this water will be totally consumed in order to protect the watershed from pollution.

The Bureau of Reclamation divides water up in the following manner. The average yearly flow of the Yellowstone is 9.4 million acrefeet; irrigation requires 2.4 million acrefeet; energy development 2.6 million acrefeet. This leaves a healthy surplus on paper. But the Yellowstone, like so many western rivers, does not flow according to statistical averages. During the drought in the sixties, it averaged 4.4 million acrefeet. During a low flow period, the Yellowstone River can carry as little as 3.7 million acrefeet.[5] For a good share of at least one year out of ten (possibly as often as one year in four), the river flow is so low that even a careful timing of projected withdrawals will exceed its volume. "Diversions of this scale," the Northern Plains Resource Council argues, "would critically threaten the efficiencies of present pumping and diversion facilities and would eliminate any further development of irrigatable lands."

Since the Yellowstone may not be able to slake the thirst of coal development, the waters from the mainstem Missouri are to augment the water supply in the Yellowstone. The Department of Interior and the Corps of Engineers say that 3 to 5 million acrefeet of water can be withdrawn from the mainstem without any problem.[6] The present average annual flow of the Missouri River at the Oahe Reservoir six miles above Pierre, S.D. is 18,525,000 acrefeet.[7] Since Oahe is the last suggested diversion point, that figure can be considered the total amount of water for all present and potential uses.

WATER SITUATION (Continued)

Every major industrial project will require massive quantities of water. Commitments to energy-related industry in the North Central Plains could seriously over-allocate the Yellowstone River and its tributaries. If water is marketed on purely competitive terms, as appears to be the case, energy companies will outbid existing and potential irrigators and preclude agricultural expansion in the Yellowstone Basin and the mainstem Missouri. This would mean a complete change in the social, cultural, and economic bases in Montana, South Dakota, Wyoming, and Nebraska.

Principal environmental and economic problems include dewatering of stream courses, increasing the cost of water beyond an irrigator's financial capabilities, disruption of aquifers, thermal pollution, destruction of fish and wildlife, disruption of productive farm and range land and air quality degradation. This large scale transfer of water use will seriously alter the established agricultural economy of a region which supplies the U.S. and the world with small grains and livestock.

DEVELOPMENT IN MONTANA

Four new electric generating facilities, two under construction and two under review, are expected to provide 2,100 megawatts of electricity from the Colstrip area of northeastern Montana.[8] All four plants are to be coal fired with evaporative cooling units which will consume about 38,400 acrefeet of water annually. Burlington Northern Railroad (BN) is proposing to construct and operate a diversion of 67,000 acrefeet of water for use in a synthetic fertilizer, methanol, and synthetic diesel facility near Circle, Montana, using coal from a BN mine.[9] Montana was issued 46,000 acrefeet in state permits for industry and 1,250,000 acrefeet have been applied for as of 1974.[10] An acrefoot is the amount of water which would cover an acre of land of water one foot deep. State officials estimate there are 42 billion tons of coal available for strip mining.[11] Montana is extremely concerned with the potential levels of development for energy and the impacts associated with energy conversion and mining operations. Therefore, the state has put a tight clamp on the exportation of its water by challenging federal water marketing in the courts. The state wants to void 658,000 acrefeet of contracts from the federal government to the energy companies. The Montana Moratorium Act of 1974 has eased the time of decision for developments within that state. It allows the Department of Natural Resources and conservation to delay action on any water rights applications over 14,000 acrefeet within the Yellowstone Basin for three years, unless the water is for an energy conversion facility approved under the state Utility Siting Act.

DEVELOPMENT IN MONTANA (Continued)

Montana has also passed The Renewable Resource Development Act which is designed to increase agricultural water use through low interest loans to farmers and ranchers for irrigation. In the 1975 session the Montana State legislature passed a bill placing the burden of proof on any applicant who seeks a permit over 15 cubic feet per second to show that prior rights will not be adversely impacted. Montana's official position is that coal be exported to other parts of the country for conversion purposes.

The Montana Department of Natural Resources finds that an additional 1.6 million acrefeet will be consumed by 2000 to irrigate an additional 600,000 acres.[12] Currently, the Yellowstone Basin has a total of 630,000 acres under irrigation, 20,000 acres have gone into irrigation in the past two years and 40,000 acres are expected to go into irrigation in the next two.[13] The Montana Fish and Wildlife Department has requested 7 million acrefeet be reserved in the river for these purposes.[14] The state would like to receive an option to market a block of water from the Fort Peck Reservoir rather than negotiate every single application with an arrangement allowing Montana up to five years to exercise an option to sell any water from the block set aside, with no payments required until the water is sold.[15]

DEVELOPMENT IN WYOMING

Wyoming state officials currently estimate that something on the order of five new major coal fired electrical generating plants, five coal gasification plants, three coal liquifaction plants, an oil shale conversion complex, and at least three coal slurry pipelines will be in operation by the year 2000.[16] So far six companies, Peabody, Amax, Arco, Carter, Sun Oil and Kerr-McGee have executed contracts for water and are proposing coal conversion facilities.[17]

Basin Electric is proposing and seeking permission from Wyoming to construct a 1,500 megawatt coal powered plant at Laramie Station. Water for this project will probably come from the run off from the North Platte River of which Nebraska officials estimate runs about "three inches deep" on the average.[18] A compact between Nebraska and Wyoming exists over the North Platte and if the water requirements for the Basin Electric project threaten Nebraska water availability, there may be a substantial fight over this. Related developments also include proposed expansion of uranium mining and milling in Fremont county and bauxite development in Albany and Carbon county.

DEVELOPMENT IN WYOMING (Continued)

Since the most extensive development of coal will occur in Wyoming, water will have to be exported from other areas to meet this projected development. As it stands, the entire state coal reserves (1.8 million acres) have been leased out to the energy companies.[19] These companies have also been purchasing water from the Federal government, the state of Wyoming and individual holders of water rights, as well as irrigatable lands, not bearing coal. Texaco has acquired about 38,000 acres of land, 8,000 of which is irrigated; Carter Oil holds 9,000 acres of which 5,000 are irrigatable; and Mobil has 3,000 acres half of which are irrigatable.[20] In the Spring of 1974 the State Legislature decided to put a lid on the water being sold to any enterprise in the state by enacting a Moratorium Act similar to Montana's. However, as an amendment to the Act, Energy Transportation Systems, Inc. was sold 20,000 acrefeet of water from the Madison ground formation, after a substantial lobbying effort which convinced the legislature that they would be using brackish water and that the withdrawal would not affect the water table. However, it was later shown that ETSI is indeed planning to take drinking water in Wyoming and South Dakota. It was also shown that a serious question of the withdrawal at that point of the formation dropping the water table exists. Mobil Oil has applications for 58 deep water wells to tap the Madison Formation on the west side of the Bighorn Mountains. Their annual withdrawal of this water would be over 390,000 acrefeet exceeding the recharge along the Bighorn estimated at about 100,000 acrefeet.[21]

The willingness of the past Wyoming administrations, particularly under Stanley Hathaway, to give these companies whatever they needed can best be described by three situations:

(a) A study of the Powder River, a tributary of the Yellowstone, made by the Harza Engineering Co. for the state estimated that about 102,900 acrefeet of water would be available from that stream. As of June of 1975, 853,365 acrefeet of industrial permits had been issued amounting to about 750 percent over appropriation of the Powder River.

The Tongue, also a tributary of the Yellowstone, according to state records has 96,400 acrefeet available. As of June of 1974, 369,000 acrefeet had been issued in industrial permits mainly to Pacific Power and Light who holds 363,000 acrefeet.[22] This represents a 400 percent over appropriation.

DEVELOPMENT IN WYOMING (Continued)

(b) The Hathaway administration secured a low interest loan from the State Farm Loan Board to construct a 49,000 capacity reservoir. This project was touted to be an example of industry/agriculture cooperation. Carter Oil (Exxon) would buy 25,000 acrefeet a year, paying an amount equal to the principal and interest due on the loan plus one half of the maintenance costs. However, based on the figures developed by Carter's own engineers, the amount of water available to the ranchers would be only 9,500 acrefeet and perhaps as little as 1,500 acrefeet annually during low stream periods. Based on Powder River Stream flow records for 1948-69 there would rarely have been more than 32,000 acrefeet for storage. So Carter Oil got a low interest loan from the State Farm Board and a guaranteed 25,000 acrefeet, leaving ranchers with what little is left over.[23]

(c) In 1962, Carter Oil, a perennial favorite of the Hathaway administration, filed a water right application for 208,000 acrefeet from the Powder River. The State Engineers office is required to issue a permit unless there is sufficient un-appropriated water available. As the law stood until two years ago, construction of a project had to begin within a year of the granting of a permit and must be completed within five years of that date. The intent of the statute was to discourage water rights speculation. Despite the statute, the State Engineer, Floyd Bishop, allowed Carter to hold this filing for more than 13 years without making a start of construction. Although not much importance is given to over allocation in western water law until competing uses face each other in court, if Carter were to exercise this right for 208,000 acrefeet, they could easily overcome the farmer and rancher in court.[24]

The present attitude of the State Government is to encourage additional reservoir construction by passing in 1975 an authorized $22 million dollars in loans for "multi-purpose" reservoirs. Although this is similar to Montana's legislation offering loans for farmers and ranchers, the multipurpose label attached to the funding may be to assure adequate storage capacity for the obvious over appropriation of the Powder River Basin by industrial users.

DEVELOPMENT IN WYOMING (Continued)

Overall water supplies in Wyoming are inadequate for industrial development. Except for the southwestern protion of Wyoming where the Green River (a tributary of the Colorado) could be used for oil shale, areas with large coal reserves have relatively small water supplies. If water from other basins cannot be exported to the coal fields of Wyoming, the development level of coal production in the North Central Plains may be far below that expected bythe proponents of "Project Independence."

DEVELOPMENT IN SOUTH DAKOTA

Although South Dakota does not contain large deposits of coal, the Mainstem Missouri with its massive reservoirs, runs through the state. The augmentation of the streams flowing over the coal fields of Wyoming, will have to rely on diversion from the Missouri in South Dakota. Also, taconite mining in the Black Hills will require water either from the Madison ground Formation or the Mainstem Missouri. And the water proposed to be mined from the Madison formation for coal slurry in neighboring Wyoming may affect the water supply of western South Dakota.

Major energy developments being considered in South Dakota include the following plants along the Missouri River:

(1) A Missouri River Power Plant for Hartland Electric Power District (200 megawatts) is expected to be on line by 1979. It will use flow through water from the Missouri River and coal probably from eastern Wyoming and southwestern North Dakota.[25]

(2) A low BTU coal gasification combined cycle power plant proposed by Northern State Power is also being considered.[26]

(3) Missouri River Hydroelectric plants include Oahe -595 megawatts, Big Bend-468 megawatts, Ft. Randall-320 megawatts, and Gavins Point-100 megawatts. Also the Corps of Engineers are studying proposals for 14 hydroelectric units at 4 dams in South Dakota.[27]

DEVELOPMENT IN SOUTH DAKOTA (Continued)

According to the Project Independence Water for Energy Blueprint, 1,400,000 acrefeet of Mainstem Missouri water will be needed to augment the water supplies in the coal fields of southwestern North Dakota, northeastern Wyoming, and southeastern Montana. Gulf Minerals has an application in for 50,000 acrefeet, and Energy Systems Transportation Inc. has an application in for 100,000 acrefeet from Oahe and 19,000 acrefeet from Shade Hill Dam in South Dakota.[28]

Construction of coal conversion plants in Wyoming will have a significant impact on the water rights in South Dakota. Now that Mainstem Missouri water is earmarked by the Federal Government, transportation of water out of South Dakota will create many problems since the state has no policy established for allowing out-of-state transfers. Removal of significant quantities of water from the agricultural base could play havoc with the state economy. It is expected that South Dakota will have to float bonds to pay for some of the construction of pipeline diversion facilities. If the return from the revenues expected from the sale and transfer of the water from Oahe to Gillette do not match the investment over the expected lifetime of the project (30 years) then South Dakota will be introduced to very serious economic risks. Although South Dakota has to develop a state water plan as required by state law, the Missouri River is number 15 on the list and it is not expected to be completed for another 1 to 5 years.[29] The State Legislature in response to the ETSI proposal in 1975 passed a law prohibiting any withdrawal from any river beyond 10,000 AF in South Dakota without approval of the State Legislature.

Finally, the South Dakota School of Mines has indicated that particulates from coal conversion could significantly reduce rainfall in the North Central plains because they would draw precipitation and take them down wind to be deposited elsewhere in the form of polluted rainfall.[30]

DEVELOPMENT IN NORTH DAKOTA

The development scenarios in North Dakota vary from 42 gasification plants and 31,000 megawatts of electrical generation to 14 gasification plants and 4,920 megawatts.[31] So far, Michigan/Wisconsin Pipeline, a subsidiary of American Natural Gas Co., proposes to construct a coal gasification plant in Mercer County and has received permission from the Federal government for a permit for 17,000 acrefeet;[32] however, the state has not agreed with this. North Dakota has asserted that the Bureau of Reclamation is a holder of a state water permit but has no authority to divert

DEVELOPMENT IN NORTH DAKOTA (Continued)

water already committed primarily for irrigation for industrial use.[33]

The North Dakota Water Conservation Commission has not yet come forth with an overall plan for development of the state's water resources. Farming and ranching groups are now seeking an injunction against the additional issuance of water permits until a comprehensive plan for water development is made by the State Water Commission. However, the Water Commission has stepped back as being the lead agency for receiving industrial applications and has now requested that industrial applicants first obtain a certificate of site compatability from the North Dakota Public Service Commission.[34]

Basin Electric Power Cooperatives is requesting water for an 800-megawatt generating plant at the ANG plant site in Mercer County.[35] People's Gas Company has applied for water to supply four coal gasification plants in Dunn County. The amount is estimated at being 30,000 acrefeet.

North Dakota has undergone a shift from promoting coal development to rejecting it in some cases such as the West River Diversion Project. In 1975, the North Dakota State Legislature voted not to support this project over the objections of the North Dakota State Water Commission. This project was to divert hundreds of thousands of acrefeet of water from Garrison Dam down to the coal fields of southwestern North Dakota.

The general attitude of the State of North Dakota concerning water rights is that the state should be able to sell or refuse to sell as much water as it pleases beyond the jurisdiction of the Federal government.

DEVELOPMENT IN NEBRASKA

Expected major energy development in Nebraska is as follows:

(1) a coal fired plant in Sutherland (2000 megawatts --- 38,000 AF of water),
(2) a pumped storage hydroplant near Lynch (1,000 to 1,600 megawatts),
(3) a coal fired plant at Nebraska City (575 megawatts),
(4) a hydropower unit Kingsley Dam (43 megawatts),
(5) a nuclear plant at Fort Calhoun (1,150 megawatts --- 20,000 AF of water),
(6) a nuclear plant at site of present Cooper Plant (1,000 megawatts),
(7) a coal gasification plant, site unknown, (250 million cubic feet per day).[36]

Nebraska has no statutory authority over the Mainstem Missouri River to market water. The State could gain such authority by altering its Constitution, currently, however, if the Federal government chooses to market water from the Mainstem Missouri, Nebraska has no legal say so in the matter whatsoever.[37] The state water rights on other rivers in the state do show a definite preference for agricultural use. Nebraska is perhaps the only North Central plain State which has utilized its irrigation potential to its fullest. In order for industry to gain a foothold in state water rights, it will have to also purchase large tracts of irrigatible lands with accompanying water rights. This would take a great deal of arable land out of food production, since the water use would be transferred to industry.

Nebraska insists that decisions to market water for industrial purposes be done in Congress not administratively. The state also feels that no assurance is given that the amount charged for water for industrial purposes will be sufficient to reimburse the Basin Account for all revenue lost. Nebraska's final concern is the adequacy of safeguards to insure long range use of water for agriculture and hydroelectric.[38]

INDIAN WATER RIGHTS

Indian water rights are based on the Winters Doctrine construed by the Supreme Court in 1908. The Doctrine holds that the Indian tribes have the right to as much water as is necessary to irrigate the total sum of their irrigable lands and that even though the right may have gone unexercised it carries a priority in the time from the date the reservation was established. The Landmark water case, Arizona v. California, re-affirmed the prior and paramount rights of Indian tribes as well as extending the water use rights of Indians beyond agricultural uses.

Indian water rights are not Federal or public rights. They are private property rights for the beneficial use of Indian tribes. Indian water rights as construed by the Winters Doctrine, and California v. Arizona cases, are not grants to the Indians but are rights held by treaty and aboriginal priority.

In terms of the Federal government's responsibility, it is supposed to act as the trustee of these rights on behalf of the tribes. In other words, because of treaty and moral obligations the Federal government is responsible for helping to determine, adjudicate, protect and develop Indian water rights. However, the Bureau of Reclamation has done everything possible to subordinate Indian Water Rights to narrow large scale industrial and agricultural users.

In June of 1974, the BIA recommended to all tribes that they develop their own water codes. Then the BIA turned around and said that although water codes had been developed, the tribes couldn't submit them and that the situation needed further study. This reversal on the part of the BIA came as a result of the pressure brought on them by the Interior Solicitor's Office, and the Bureau of Reclamation.

The States containing Indian reservations are even more strident in systematically denying Indian water rights in preference to non-Indian uses. Over the past ten years, Indian tribes have rapidly developed sophisticated legal strength and now pose a real threat to water related expansion. The National Water Commission has stated that unless Indian water rights are settled, many energy and agriculture projects will be precluded. Much of this rhetoric from the Commission is to push for a final settlement where Indians will have no real say over the amount of water they are entitled to and how they should use it.

The three affiliated tribes at Fort Berthold in North Dakota are contemplating action to determine and adjudicate their water rights. According to their attorney they will argue that the Missouri is over committed and that honoring present Indian water rights will leave North Dakota short for its own uses.[39]

INDIAN WATER RIGHTS (Continued)

In Montana, the Northern Cheyenne and Crow Tribes are entering into separate suits to determine and adjudicate their rights. Both tribes are claiming rights from the common boundary of the State of Montana to the headwaters of the Tongue and Bighorn Rivers.[40] The State of Montana is struggling to get the cases argued in a friendlier state court and the Federal government is trying their best to discourage the tribes from venturing on their own by forcing the Northern Cheyenne, for example, to use their economic development funds for litigation.

The Fort Peck Tribe is presently conducting a water resource inventory with the assistance of the Bureau of Indian Affairs. The inventory includes: Indian Water Rights including natural flow and storage; the rights of Indian tribes to market waters they have paramount claim to which are in the Reservoirs along the Missouri River; the current Federal and state laws; international compacts; public land and state land water requirements.[41]

The Crow Creek Sioux Tribe, who reside along the eastern shoreline of the Big Bend Reservoir in South Dakota maintain that the Department of Interior has been diminishing their water rights and the authority of the tribal council to comprehensively regulate water within the exterior boundaries of their reservation. The tribe is seeking the Department of Interior to honor the rights of the tribe to issue all water claims within the exterior boundaries of their reservation; to establish and collect water user's fees; to submit all water applications for state perusal; but to have final authority rest with the tribe. Finally, the tribe requests that it be given full membership to the Missouri River Basin Commission. The Crow Creek Tribe also wants to utilize Missouri River water to irrigate 30,000 acres of their land.[42]

The tribes in South Dakota have also indicated that they too are planning litigation to exercise their rights on the Missouri.

Arapahoe and Shoshone Tribes of the Wind River reservation in Wyoming are asserting that they cannot obtain a fair and impartial determination of their water rights as long as the Secretary of Interior simultaneously sells large quantities of water to large industrial users. The tribe claims to have 198,542 acres available for irrigation.

The Shoshones and Arapahoes are also maintaining that pending further settlement of the tribes' rights, the Department should neither sell or commit any further water unless they are to be made a party of such contracts, placing the contracts subordinate to their Winters rights entitlements.[43]

LEGAL ISSUES

The critical question, "Who controls the water?" has not yet been completely answered. The following court cases pertain to some of the legal ramifications of the water for energy questions.

New Mexico v. U.S. This case was filed in New Mexico state court in the spring of 1975 by the State of New Mexico to force determination and adjudication of Indian water rights in State Court. New Mexico is arguing that the Navajo tribe which has the oldest treaty date be given prior rights over other tribes using common water. This in effect sets up the Navajo's as a water broker and pits one tribe against another. 44/

Mary Aikin v. U.S. This case is parallel to New Mexico v. U.S. in that it arises out of the San Juan River Basin in northwestern New Mexico and southwestern Colorado. The issue again is primarily jurisdictional. Should Federal or State courts adjudicate water disputes? The case involves 1,200 water users and the U.S. government, which claims jurisdiction over the river by virtue of its passage over Federal and Indian lands including a national park, several national monuments and an Indian reservation.

The Supreme Court has ruled on March 24, 1976 that States do have the right to adjudicate waters within the boundaries of their state lines under the McCarran amendment. * The consideration of the court did not take into account the private property rights held in trust for Indian tribes. This is a crucial point in that the federal government argued that Indian rights are federal rights, which negates the sovereignty of treaty rights of Indian tribes under the Winters Doctrine. This case is important because it may serve as a precedent for other cases in the future --- and could become the basis of a state's right battle for water in the west. 45/

United States v. California. This case deals with Federal preemption of State water rights. The Federal District court in California has entered a judgment declaring that the U.S. can without applying to the state of California, appropriate all unappropriated waters necessary for use in any Federal Reclamation project. This case will certainly set a precedent for the rights of states to place Federal water uses under state laws, and will have significant impact on the Upper Missouri Basin states. This decision is certainly being appealed in Federal court. 46/

* 43 U.S.C. § 666, 66 Stat. 560.

LEGAL ISSUES (Continued)

Arizona v. California. Three cases represent the bulk of a 45 year struggle over allocation, use, and jurisdiction over the Colorado River System between Arizona, Nevada, California and the Federal government. The first case, 283 U.S. 423 (1931) arose out of the attempt by Arizona to enjoin the Boulder Canyon Project Act of 1928 which authorized water from the lower Colorado Basin for irrigation and urban expansion in Southern California. The Supreme Court ruled that the Colorado is a navigatible stream and the U.S. government can develop the Colorado system as it sees fit under the commerce clause of the Constitution. 47/

The second case ,298 U.S. 588(1936), stemmed from the attempt of Arizona to assert control over the Boulder Canyon Act of 1928 with state laws and state held prior appropriations. Again, the supreme Court ruled that the U.S. government under the commerce clause of the Constitution is not subject to the control of the state in building projects. 48/

The third case, 373 U.S. 546(1963), stemmed from the question of whether the states had control over the allocation of the Colorado River.

In this case California was seeking a larger allocation despite the uses earmarked for the water by Arizona. Again the Supreme Court ruled that the Federal government has the final power to allocate water in the Colorado River. Also, that compacts, and all other elements governing state law which interposed Federal law could be moved aside by Congress; that the tributaries of the Colorado in Arizona are not to be considered in the allocation of Colorado river system; and that the administrative power of the Federal government over the Colorado River lies in the hands of the Secretary of Interior. Finally the Winters Doctrine asserting Indian water rights would be applicable to all present and future uses as well as expanding Indian water rights to include uses other than agriculture. The final outcome was an allocation of the lower Basin account of 7.5 million acrefeet per year divided with California receiving 4.4 million acrefeet per year, Arizona 2.8 million, and Nevada receiving 300,000 AF. 49

The backdrop of these cases was set by the struggle between the economic forces in California and Arizona. Because California was rapidly utilizing their water through the Boulder Canyon Act of 1928 for irrigation of the imperial valley, Arizona, fearing an over allocation by California,attempted to enjoin the Federal Project unsuccessfully. The spectacular growth of the Imperial Valley's agricultural economy would prove to be the dominant interest behind the decisions rendered by the courts. The agricultural methods of farming the Imperial Valley required massive capital investment to grow food along the vast expanse of what was a semi-arid desert. And so, by centralizing control over the Colorado through the Department of Interior and Congress, the capital investments promoting rapid growth in Southern California were protected.

LEGAL ISSUES (Continued)

Out of the sheer force of massive agricultural and urban expansion came two basic precedents which have served to protect capital investment in water projects and their related growth:

(a) Once a "present beneficial use" precedent is established, no state can interfere with it. In the case of California, it has been using Colorado River water for years to expand municipal and agricultural growth. Any effort to take away this water would cause serious impacts on the state.

(b) Once an interstate commerce project is established no state can interfere with it. For example, if water being used in Imperial Valley from the Colorado were shut off then the food products now supplying the nation would be cut back to the detriment of the nation.

These two precedents will have an enormous implication to energy development in the Upper Missouri Basin. For example, if an energy conversion project were established in a state and was supplying energy to another part of the country it can fall very easily into the two categories of "present beneficial maximum user and interstate commerce project." So if it were proven that this project was seriously affecting the water supply for agriculture no state or entity could interfere with it.

First Iowa Hydroelectric Coop. v. FPC. (328 U.S. 152 (1946)). This case arose out of the attempt by the state of Iowa to force Federal hydroelectric projects on navigatable streams to comply with state laws setting up a situation of duplicate compliance. The Supreme Court ruled that the states do not have veto power through state laws when the commerce clause of the Constitution is involved.[50]

EDF v. Morton. Successful litigation of this suit will significantly slow development pressure because the Federal government would have to evaluate all of its existing water commitments. The case centers around three basic issues: (1) the authority of the Federal government to market water for industrial purposes under existing statutes in the Upper Missouri Basin without Congressional changes; (2) the violation of Article X of the Yellowstone Compact which prohibits interstate diversion of water from Montana to the coal fields of Wyoming; (3) the requirement of Environmental Impact Statements on all contracts for industrial water options in the Yellowstone Basin.[51]

LEGAL ISSUES (Continued)

Intake Pipeline Co. v. Montana and North Dakota. This case deals with Article X of the Yellowstone Compact. Intake pipeline, a subsidiary of Tenneco is challenging the constitutionality of the Yellowstone Compact in the Federal District court in Billings, as it relates to the prohibition of interstate transfers. Intake wants to move water from Glendive, Montana to Beach, North Dakota. If the Yellowstone Compact is broken, diversions of water from one state to another could greatly expand industrial development.

If the court does uphold the prohibition of interbasin transfers, Tenneco could circumvent Article X by building its plant further west and inside the Yellowstone Basin. The coal then would have to be moved from the company's coal fields in North Dakota across the state lines into Montana.[52]

Intake v. Montana. Intake Water Company has recently won this case to have permits for 80,000 acrefeet from the Yellowstone River for construction of as many as 8 gasification plants. Tenneco had claimed this water under provisions of Montana law which was repealed in 1973 by the state legislature. The District court has ruled that the old law applies.[53]

FEDERAL LAW

"There has been a slow evolution of the Bureau of Reclamation program toward including municipal and industrial (M&I) water supply as project purposes. But each organic reclamation statute has placed specific limitations on supplying M&I water from reclamation projects"54/:

1. The Miscellaneous Supply Act of 1920. This early Act placed veto power over all contracts set out by the Secretary of Interior for purposes other than agriculture in the hands of state approved water users associations. There had to be clear showing that no practical alternative water source existed, that rights of prior appropriators would be protected and that the industrial supply would not be detrimental to irrigation needs. The Library of Congress American Law Division has pointed out that the Department of Interior has repealed this law by implication with no authorizing language in subsequent reclamation acts repealing the 1920 Act.55/

2. "The 1939 Reclamation Project Act. This Act provides for multipurpose sale of water for municipal and miscellaneous uses where authorized, but the Secretary of Interior must make a finding that the value of the project for irrigation is not to be precluded for municipal and industrial uses."56/

3. The Flood Control Act of 1944. Although Congress envisioned multiple and changing uses on the reservoirs authorized in the 1944 Flood Control Act, its designation of dominant interest had the effect of giving preference to uses viewed as contributing to the greatest good of the people of various regions served by the projects, and that authorization to alter the expressed dominant interest intended by Congress had not been delegated. Changes in that preference require new Congressional approval.

The Congress and the Bureau of Reclamation envisioned the continued dominance of agriculture as the economic base of the Missouri River Basin and recommended that reservoirs on the Yellowstone River and the Upper Mainstem Missouri should be primarily for irrigation; and that agricultural dominance in the Upper Missouri Basin was accepted in the reconciliation between the Corps and the Bureau of Reclamation and adopted by Congress through incorporation of the Pick/Sloan Plan as the document in the Act, Congress thereby endorsed and adopted irrigation as the primary use intended of water from Projects in the Upper Missouri Basin.57/

FEDERAL LAW (Continued)

4. The 1958 Water Supply Act. This Act states that storage for municipal and industrial uses may be included in existing or future Reclamation or Corps projects but must be specifically authorized by Congress if the original purposes of the project --- such as irrigation --- would be seriously affected. This is outlined particularly in Title III of the Act.

"This progression of Congressional Acts shows that Congress has approached the whole question of "M&I" water very cautiously. It is clear that the notion of devoting enormous quantities of water, let alone the preponderance of a certain project's, river's, or region's water to energy/industrial uses has never been raised or approved by Congress.

"It is clear that the demand for industrial water is exceeding all prior expectations. But the use of the term "miscellaneous" or "industrial" in the existing reclamation laws obviously did not contemplate massive energy/industrial demands, and we must be sure that these limited authorizations for "M&I" water are not interpreted by the agencies as broad authority for massive industrial water allocations from Federal projects."[58]

RECENT FEDERAL ACTIONS

Industrial Water Marketing Program --- 1967-1972. This program was instituted by Secretary of Interior Stuart Udall and Assistant Secretary for Water and Power Ken Hollum. The Nixon administration subsequently carried it on until the farmers, ranchers, States and Indian tribes affected by this program discovered the magnitude of the sales in 1972. Since then the Department has imposed a moratorium over sales in the Yellowstone Basin until the lawsuit brought against them by the Environmental Defense Fund, irrigationists, and the State of Montana is resolved. This program had no procedures whereby the States, water users' association, and Indian tribes could approve the contracts. The only approval was a special procedure within the Department. The states were never informed through formal procedure as to what the water being sold was going to be used. As a result, 658,000 acrefeet of water was optioned out quietly at a price ranging from 9 to 11 dollars an acrefoot with a 50¢ option to renew. The amount of water optioned from the Yellowtail reservoir may well have exceeded its active storage capacity. Although the Yellowtail reservoir, where most of the sales went on, is clearly authorized for agriculture, no water has been allocated for irrigation from this reservoir since its construction.[59]

RECENT FEDERAL ACTIONS (Continued)

The Ad Hoc Committee on water marketing in the Upper Missouri Basin was formed upon the request of the Corps of Engineers and the Bureau of Reclamation to the Missouri River Basin Commission. The Committee was comprised of representatives from the states of Montana, Wyoming, South Dakota, North Dakota, and Nebraska; the Corps of Engineers, the Bureau of Reclamation and the Missouri River Basin Commission. The purpose of the Committee was to settle upon convincing approaches to market water from the main stem Missouri River for industrial purposes. They also agreed upon setting the price of this water in the range of $3 to $20 an acrefoot. The states were given the first right to market. However, the key problems of how much water does each state have right to, what are the Indian rights to this water, and who has final veto power over industrial water contracts was never resolved. Following this impasse, the Federal government imposed the "Memorandum of Understanding," which effectively repealed the efforts of the ad hoc committee to settle upon a regional approach to industrial water marketing.60/

In February of 1975, the Corps of Engineers and the Department of Interior signed a "memorandum of understanding" which would expedite the sale of main stem Missouri water for industrial use. Hearings were held by Senators Abourezk and Metcalf on this action and it was discovered that the states were never informed of this agreement, that agricultural water is to be "loaned" to industry, and that industrial water use will have preference over hydroelectric generation. The first customer for this water is ETSI who wants it for a coal slurry pipeline from Wyoming to Arkansas.61/

The House Interior Committee of the U.S. Congress is currently considering a bill to institutionalize coal slurry pipelines (H.R. 1863). The first major project and prime lobbyist for this bill is being pushed by ETSI* who is proposing the Wyoming/Arkansas slurry line using western coal and water either from the Madison Formation or the Main stem Missouri in South Dakota. This bill also represents the institutionalization of industrial water use in the Upper Missouri by Congress, since ETSI is the first large scale user and costomer for Upper Missouri water.

* ETSI or Energy Transportation Systems Inc. is a wholly owned joint venture between Lehman Brothers Investment firm and Bechtel Engineering and Construction.

WATER DIVERSION SCHEMES 62/

A total of 13 diversion plans has been advanced, 2 for agriculture and 11 for industrial development.

(1) The Agricultural Diversions are Garrison irrigation project in North Dakota and Oahe Irrigation Project in South Dakota. Garrison is under construction. Oahe is in the planning stages but faces formidable legal obstacles and local opposition.

(2) The West River Diversion Project in North Dakota would carry water from Lake Sakakawea behind Garrison Dam on the Missouri across the headwaters of the five tributaries of the Little Missouri, the Knife, the Heart, the Cannonball and the Grand River. Water would be released into these streams which would be damned to provide storage. The total diversion, four million acrefeet according to the North Dakota Water Commission, would support 42 gasification projects and 8,800 megawatts of electrical power generation. In exchange, the farmers and ranchers of this area are promised some water for agricultural use. However, the North Dakota state legislature has voted not to support this project over the objections of the North Dakota State Water Commission.

(3) Water for Taconite in the Black Hills --- The Bureau of Reclamation (which will cooperate with the North Dakota State Water Commission in designing the West River Diversion facilities) has studied moving water to the Sturgis, S.D. area for industrial use. Pittsburgh Pacific Mining of Hibbing, Minnesota has claimed 96 million tons of taconite # iron ore under about 250 acres of National Forest Land in the Black Hills. Pitt-Pac plans to market 1,000,000 tons per year in Rapid City, probably to meet the steel requirements of coal gasification and thermal electrical generation.

(4) Water from North Dakota to Wyoming. The United Plainsmen, an environmental group in North Dakota, has pointed out that the Sturgis area is only a short distance from the coal rich but water poor Powder River Basin in Wyoming. The Bureau of Reclamation has said publically that they have scrapped plans to divert water from North Dakota to Wyoming; however, the Bureau has not been very credible in their dealings with the states so far.

WATER DIVERSION SCHEMES (Continued)

(5) Water from South Dakota to Wyoming. The Black Hills Conservancy Subdistrict, along with the Bureau of Reclamation, has developed a feasibility study to transport about 100,000 acrefeet from the Oahe Reservoir across western South Dakota (between the Cheyenne and Bad Rivers) into the Gillette Wyoming area. 20,000 acrefeet is to be mixed with coal and sent down to Arkansas in slurry form. The first pipeline of this sort is expected to ship 25 million tons of coal a year. Since water is scarce in the Gillette Area, it seems likely that the water not being used by Energy Transportation Systems Inc. (ETSI) could be sold to other energy interests for coal conversion at the mine site.

(6) Water from the Madison Underground Formation. ETSI has secured 20,000 acrefeet of water from the Madison Formation from the state of Wyoming. They plan to drill a high pressure well field in one of the shallower sections of the formation, which is being used for drinking water and stock water for the communities in eastern Wyoming and western South Dakota. There is a serious question as to whether this 20,000 acrefoot withdrawal will exceed the recharge of the formation, thus dropping the entire water table of the Powder and Cheyenne River Basins. Since the Madison Formation is under individual state jurisdiction, it will be up to the courts or Congress via an interstate compact to determine whether or not industrial use of the Madison Formation is beneficial.

(7) Water from Montana to Wyoming. The Yellowstone River Diversion is discussed in great detail in the Bureau of Reclamation's Montana/Wyoming Aqueduct Study. The study projects the construction of a large number of additional reservoirs on the Tongue and Powder, other tributaries of the Yellowstone and the Yellowstone itself; as well as construction of a large number of aqueducts for transporting water from the Boysen and Yellowtail reservoirs, to points of industrial use, mainly around the Gillette Wyoming Area. Three projects are being actively considered: the first one would take water from the Yellowstone River near Miles City, Montana, to Gillette, Wyoming; the second project would divert water from the Big Horn River in Hardin, Montana, to Gillette, Wyoming; and the third project would divert water from the Boysen Reservoir along the Wind River Reservation in Wyoming to the Gillette area.*

* The diversion from Montana to Wyoming would violate Article X of the Yellowstone Compact, which prohibits the transfer of water from Montana to Wyoming. Montana, Wyoming, and North Dakota are signatory states. However, the transfers of water proposed by the Bureau of Reclamation in the Wyoming/Montana Aqueduct Study do not comply with the formula for water use outlined in the Compact which was signed in 1950. That formula allocates a 60-40 share between Montana

WATER DIVERSION SCHEMES (Continued)

(8) North Platte River in Wyoming to the Powder River* in Wyoming. This project was promoted by the former Secretary of Interior, Stanley Hathaway, while he was Governor of Wyoming. Hathaway attempted to get state funds to build a diversion from the North Platte River near Casper to Gillette. The North Platte is not a large river and the flows might not sustain an industrial diversion without augmentation from another river system, the Green River.

(9) Green River to the North Platte in Wyoming. The augmentation diversin was also promoted by Stanley Hathaway while Governor of Wyoming. The Green River is a tributary of the Colorado and is located in southern Wyoming. This diversion could aggravate salinity problems in the lower Colorado Basin.

(10) Fort Peck to Circle, Montana. This diversion would take water from the Missouri River behind Fort Peck Dam to the Circle, Montana area where Burlington Northern Railroad is planning an industrial complex which would produce nitrogen fertilizer, methanol, and synthetic diesel fuel from low quality lignite coal.

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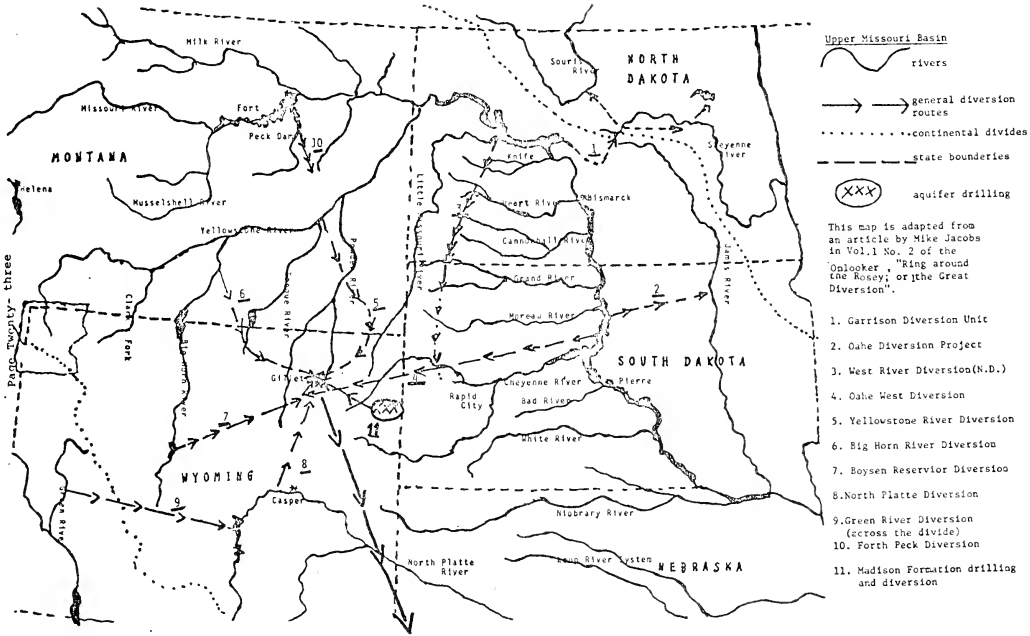
and Wyoming, with Montana getting the larger percentage. North Dakota, although not directly involved, does have a say over the issue of interbasin transfer. In addition, Montana state law forbids any transfer from the state without consent from the state legislature, which so far has not agreed.

* There exists a compact on this stream which gives Wyoming 25% and Nebraska 75% of the share of the North Platte. If over allocations went beyond Wyoming's 25%, then irrigation in western Nebraska could be affected. Thus leading to an interstate legal fight.


Milk River
Missouri River
Fort Peck Dam
MONTANA
Helena
Musselshell River
Yellowstone River
Powder River
Little Missouri River
Knife River
Heart River
Bismarck
Cannonball River
Grand River
Moreau River
Cheyenne River
Pierre
Rapid City
Bad River
White River
Niobrara River
North Platte River
Platte River System
NEBRASKA
SOUTH DAKOTA
NORTH DAKOTA
Sourris River
Cheyenne River
Page Twenty-three
Clark Fork
Big Horn River
Gillette
Casper
WYOMING
Green River
Upper Missouri Basin
rivers
general diversion routes
continental divides
state bounderies
aquifer drilling
This map is adapted from an article by Mike Jacobs in Vol.1 No. 2 of the Onlooker , "Ring around the Rosey; or the Great Diversion".
1. Garrison Diversion Unit
2. Oahe Diversion Project
3. West River Diversion(N.D.)
4. Oahe West Diversion
5. Yellowstone River Diversion
6. Big Horn River Diversion
7. Boysen Reservior Diversion
8. North Platte Diversion
9. Green River Diversion (across the divide)
10. Forth Peck Diversion
11. Madison Formation drilling and diversion

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9. Upper Missouri Basin Hearings pg. 224, 426

10. " " " " " 232

11. FEA Report pg. IV-51

12. Upper Missouri Basin Hearings pg. 227

13. " " " " " 226-7

14. " " " " " 248

15. " " " " " 207

16. FEA Report pg. IV-51

17. Upper Missouri Basin Hearings pg. 234

18. " " " " pg. 297

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32. " " " " pg. 261

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33. " " " " pg. 282

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39. " " " " pg. 393

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END NOTES (Continued)

41. Upper Missouri Basin Hearings pg. 267

42. " " " " " 386

43. " " " " " 464

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CORRESPONDENCE

CONGRESS OF AMERICAN INDIANS,
Washington, D.C., March 26, 1976.

Senator JAMES ABOUREZK,
Chairman, Senate Indian Affairs Subcommittee,
Washington, D.C.

DEAR SENATOR ABOUREZK: On March 24, 1976, the Supreme Court rendered its opinion in the *Akins case*, which is entitled *Colorado River Water Conservation District, et al.* v. *United States; Mary Akin, et al.* v. *United States*. A copy of that opinion is attached.

Consequences of the *Akin* decision can be catastrophic to Indian nations, tribes and people. It construes the so-called McCarran Amendment (43 U.S.C. 666) as being applicable to Indian rights to the use of water and subjects those rights to state court jurisdiction for the adjudication of them. Tenuous nature of the decision and the extent to which the Court had to strain to arrive at its conclusion is attested to by sharp and cogent dissents of three Justices. Yet, the cruel fact remains, the Indians for the first time in history are confronted with losing their *Winters* doctrine rights in state courts. Practical experience in those courts has repeatedly demonstrated that the Indians invariably lose in those courts.

Adding to the dilemma created by *Akin*, which the Indian people are facing, is the adamant refusal of the Justice Department to distinguish between Indian rights to the use of water and the rights for reclamation projects, national forests and similar non-Indian federal rights. That refusal by the Justice Department manifestly contributed to the *Akin* decision.

Another factor of great importance and equal seriousness to the Indian people is the ongoing internal struggle within the Department of the Interior between the Bureau of Reclamation and the Bureau of Indian Affairs over the method of determining water requirements for Indians, particularly in the Upper Basin of the Missouri River. Due to that internal and unresolved struggle, the Interior Department and the Justice Department employees are not in a position to present effectively the Indian claims in a friendly tribunal, much less in hostile state courts.

Pending cases in the State of Montana involving the Crow Tribe and the Northern Cheyenne Tribe, *United States.* vs. *Big Horn Canal Company* and *United States* vs. *Tongue River Water Users Association;* in the San Juan River Basin, *New Mexico* vs. *United States;* in the Rio Grande, *United States* vs. *Aamodt*, and other cases all point to irreparable and continuing damage for Indians throughout Western United States.

On that background, I cannot urge too strongly that you introduce an amendment to the McCarran amendment exempting Indian rights from its application. A copy of suggested amendatory language is attached.

The National Congress of American Indians and all Indian nations, tribes and people will be forever grateful for your assistance in this matter.

Sincerely,

MEL TONASKET, *President.*

ATTACHMENT

(Suggested Amendatory Language, McCarran Act (43 U.S.C. 666), Act of July 10, 1952, C. 651, Title II, Sec. 208 (a)–(c), 66 Stat. 560)

Provided, however, that this consent to the joinder of the United States as a defendant in suits or proceedings for the adjudication of rights to the use of water does not extend to or in any way include rights to or interest in the use of water of Indian nations, tribes or people, and those Indian rights to the use of water be and the same are specifically declared to be immune from state jurisdiction, control, administration or adjudication by states, state courts, state agencies, tribunals or administrative officers or state proceedings, any judicial decisions or opinions to the contrary notwithstanding.

(Authorized, National Congress of American Indians Executive Committee Resolution, March 26, 1976.)

WILKINSON, CRAGUN & BARKER,
Washington, D.C., June 23, 1976.

Re Adjudication of Indian Water Rights.

HON. EDWARD M. KENNEDY, *Chairman, Subcommittee on Administrative Practice and Procedure, Washington, D.C.*

DEAR SENATOR KENNEDY: We are general counsel for the Arapahoe tribe of the Wind River reservation, Wyoming, the Confederated Salish and Kototenai tribes of the Flathead reservation Montana, the Three Affiliated tribes of the Fort Berthold reservation, North Dakota, the Hoopa Valley tribe of the Hoopa Valley reservation, California, the National Congress of American Indians, and we are water rights counsel to the Crow Tribe of the Crow Indian Reservation, Montana.

We are pleased to have this opportunity to express views on behaif of our clients concerning the future of adjudications and administration of Indian water rights following the decision of the Supreme Court of the United States in the consolidated cases *Colorado River Water Conservation District* v. *United States*, 74-940, and *Akin* v. *United States*, 74-949, —— U.S. ——, 44 U.S.L.W. 4372 (decided March 24, 1976) (hereinafter referred to as *Akin*).

As you know, *Akin* holds that Federal courts have jurisdiction over suits brought by the United States to adjudicate in its own behalf and in behalf of Indian tribes for whom it is trustee, Federal and Indian reserved water rights. The decision also holds that the McCarran amendment, now codified at 43 U.S.C. 666, was intended by Congress to subject Indian reserved water rights to adjudication under state law, even in state courts, when the United States is named a defendant in suits to adjudicate water rights "owned by" the United States. The Supreme Court, by a vote of 6 to 3, also ruled that, although the obligation of a Federal court to exercise the jurisdiction it has been given by Congress is not lightly avoided, certain factors present in the *Akin* case led to the conclusion that these Federal actions should be dismissed in favor of a subsequently initiated state proceeding in which the United States had been named a defendant pursuant to Colorado law. The United States had brought the Federal suit to determine the reserved rights to the waters of the Colorado River and its tributaries for purposes of various Federal proprietary reservations and the reservations of the Southern Ute and Ute Mountain Ute Indian tribes.

The Supreme Court listed four factors which it felt compelled the avoidance of the exercise of Federal court jurisdiction in favor of the state proceeding. The Court noted that nothing had occurred in the Federal proceeding except the filing of the complaint and of the motion of the defendants to dismiss, even though, as the dissenting justices pointed out, little could have occurred because the motion to dismiss was granted so promptly. The Court found also that the naming of 1,000 defendants in the Federal proceeding showed a heavy involvement of state law, but the dissenters were convinced that fact only evidenced the ability of the Federal court to complete an adjudication of Federal and Indian reserved rights in a unitary suit. The Court further pointed to the fact that the United States had already been named a defendant in three other Colorado water divisions, even though the dissent countered that these were separate proceedings which could consititute no waiver of the United States' rights to bring an unrelated Federal action involving a fourth state water division. The Court finally was persuaded that the Federal action should be dismissed because the state water court was located in the heart of the division involved, whereas the Federal forum was some 300 miles away, to which the three dissenters retorted that modern transportation made slight significance of this fact and that the Federal court was authorized to sit in Durango, the headquarters of the division involved.

It is obvious from a reading of this case that the factors leading to dismissal were intimately involved with the peculiarities of Colorado water law. The wide variety of state water statutory schemes will almost surely produce different factors that will lead to different results in different cases. Different results will likely flow not only from distinctions in state statutory law, but also from facts surrounding each case, such as how far any other Federal suit has progressed before the United States is named a defendant in a related state proceeding, how distanct the locality under adjudication is from the state and Federal courts, how many named defendants have been sued in Federal court, and a variety of other possible factors. Because of these variable considerations, *Akin* is in our opinion *sui generis*. It will not automatically control any other adjudication.

Nevertheless, it is equally clear that *Akin* has deprived Indian tribes of any *assurance* that their water rights can always be adjudicated in Federal courts, where treatment accorded tribal rights has traditionally been more favorable than that given by state tribunals.

This assurance is a clear necessity if the Indians' rights generally are to be preserved. The likelihood is remote that state judges will apply Indian law and federal treaty and statutory interpretation to Indian rights questions as favorably to Indians as will Federal judges. Normally the state judge is subject to periodic reappointment by state governors and legislatures or to periodic reelection by largely non-Indian voters. Such selection realities do not engender in these juges the kind of independence from local, political pressures that is more characteristic of the Federal judge appointed for life by the President of the United States. In nearly any locale, the state judge is likely to find intense local feeling on any issue, particularly in a water rights case, where Indian rights come into conflict with non-Indian claims. These same political realities contribute to the less favorable treatment accorded Indian rights cases in state appellate courts, as compared to the Federal appellate tribunals. In those instances where Indian water rights may be adjudicated in state courts, the only federal review possible will be through the uncertain route of seeking the discretionary writ of certiorari from the Supreme Court. But in a water rights case, the factfinding obligations of the trial court are so enormous that certiorari may offer only a fragile possibility for significant Supreme Court review of the myriad of complex issues of fact and law involved. A Federal trial court decree, however, carries the right of appeal to a Federal court of appeal, as well as the opportunity to petition for a writ of certiorari.

The Indian reluctance to submit their rights to adjudication in state courts is well-founded in the history of such litigation. Cases during the past 4 years in which the Supreme Court has agreed to review state court judgments adverse to Indians have resulted in the reversal of eight of those none judgments, usually unanimously, as pointed out initially in a brief *amici curiae*, filed in *Akin* by the tribes whose water rights were involved. The eight reversals were *Bryan* v. *Itasca County*, —— U.S. ——, 44 U.S.L.W. 4832 (decided June 14, 1976) (9:0); *Fisher* v. *District Court*, —— U.S. ——, 44 U.S.L.W. 3490 (decided March 1, 1976) (*per curiam*); *Antoine* vs. *Washington*, 420 U.S. 194 (1975) (7:2); *Satiacum* vs. *Washington*, 414 U.S. 1 (1973) (9:0); *Washington Game Dept.* vs. *Puyallup Tribe*, 414 U.S. 44 (1973) (9:0); *Mattz* vs. *Arnett*, 412 U.S. 481 (1973) (9:0); *Mescalero Apache Tribe* vs. *Jones*, 411 U.S. 145 (1973) (reversed in part (9:0), affirmed in part (6:3)); *McClanahan* vs. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973). The single affirmance, not unanimous, occurred in *DeCoteau* vs. *District County Court*, 420 U.S. 425 (1975) (6:3).

Akin may leave open the possibility that an Indian tribe can initiate its own suit in Federal court and obtain adjudication of rights there without fear of dismissal in favor of a state suit. Even this result is not assured. Nor does that possibility practically pertain to every, or perhaps any, Indian tribe in view of the enormous cost involved with conducting such litigation. It is certainly beyond the financial capacity of many tribes to independently pay for such a suit and it could well bankrupt even the most prosperous of the Nation's tribes.

The assurance of Federal adjudication can be restored to Indian tribes now only through enactment of an amendment to the McCarran amendment. That restoration is essential to the full protection of Indian rights. Indian water rights must be specifically exempted by Congress from provisions of the McCarran amendment. Our clients urge an enactment providing that exemption.

Respectfully submitted,

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